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State v. Hopkins: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders

INTRODUCTION

Child molestation is a grave and ubiquitous problem in our society.¹ It is also the type of crime that many people consider to be the most detestable kind of behavior.² Due to the reprehensible nature of the crime, juries often assume that an allegation of child molestation is truthful.³ Perhaps acknowledging that these emotions must not control the jury's decision-making process, the Rhode Island Supreme Court adopted Rule of Evidence 404(b).⁴ Rule 404(b), which creates a safeguard against juries' determining

1. In a 1989 survey, the Bureau of Justice Statistics polled 60,000 adults to determine which crimes the public perceived as the most heinous. Although many people considered murder the most heinous crime, rape, incest and child abuse rank as the next three most disdained crimes. See Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 Fordham Urb. L.J. 285, 297 (1995); see also Laura Meade Kirk, *Innocence Lost: Child Sexual Abuse in Rhode Island*, Prov. J. Bull., Dec. 29, 1996, at A1, available in 1996 WL 14174516 (citing David Cicilline, a Rhode Island defense attorney who handles numerous child-molestation cases).

2. See Imwinkelried, *supra* note 1, at 297.

3. See Sarah B. Colley, *New Mexico Rejects the "Lewd and Lascivious" Exception to Rule 404(b)*: State v. Lucero, 24 N.M. L. Rev. 427, 435 (1994) (noting that the prejudicial effect of prior misconduct evidence can be quite powerful in child-molestation cases); Mary Christine Hutton, Commentary, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 625-26 (1989) (noting that prior misconduct evidence is outcome determinative in nearly all child-molestation cases).

4. R.I. R. Evid. 404(b). The Rhode Island Supreme Court adopted the Rhode Island Rules of Evidence on July 23, 1987. These new evidentiary rules took effect on October 1, 1987. *Id.* Before Rhode Island enacted evidentiary Rule 404(b), the Rhode Island Supreme Court had followed a similar common-law rule. See State v. Jalette, 382 A.2d 526, 531-32 (R.I. 1978) (citing State v. Mastracchio, 312 A.2d 190 (R.I. 1973); State v. Guaraneri, 194 A. 589 (R.I. 1937)). Rhode Island Rule 404(b) is identical to Federal Rule of Evidence 404(b).

a defendant's legal fate based exclusively on emotion, prohibits the use of character evidence to establish the accused's propensity to commit the alleged crime.⁵ Thus, the prosecution may not offer evidence of a defendant's prior bad acts unless the evidence is substantially relevant for some other purpose besides proving the defendant's propensity to commit the crime charged.⁶

*State v. Hopkins*⁷ is the most recent example of the Rhode Island Supreme Court's trend of allowing trial judges greater discretion in the admissibility of evidence of prior bad acts within sexual-molestation prosecutions.⁸ In *Hopkins*, the court admitted evidence of prior bad acts of the defendant under the guise of permissible prior bad-acts evidence.⁹ Since child-molestation cases do not fit neatly within the recognized other-purposes provision of Rule 404(b), the Rhode Island Supreme Court tends to condone a manipulation of the rule so that virtually all prior sexual-misconduct evidence is admissible.¹⁰ Thus, the court continues to ignore the fact that the prejudicial effect of prior bad-acts evidence can be especially strong in child-molestation cases.¹¹ The supreme court's practice of condoning the manipulation of Rule 404(b) to permit the admission of prior bad-acts evidence essentially eviscerates the protections enunciated by the Rhode Island Rules of Evidence, and thus renders the determination of the admissibility of prior bad-acts evidence enigmatic.

5. R.I. R. Evid. 404(b).

6. See *Jalette*, 382 A.2d at 532; see also *State v. Gomes*, 690 A.2d 310, 316 (R.I. 1997) (noting that prior bad-acts evidence is generally inadmissible and courts cannot admit the evidence solely to prove the defendant's propensity to commit the charged crime); *State v. Lemon*, 497 A.2d 713, 720 (R.I. 1985) (recognizing that prior bad-acts evidence is admissible to establish a fact, other than propensity, that tends to prove the defendant's guilt).

7. 698 A.2d 183 (R.I. 1997).

8. See *id.* See generally Douglas J. Brocker, *Survey of Developments in North Carolina Law: Indelible Ink in the Milk: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in State v. Coffey*, 69 N.C. L. Rev. 1604, 1604 (1991) ("The issue of admission of uncharged misconduct evidence is the most litigated evidentiary issue in most federal and state appellate courts. The multitude of litigation in this area no doubt results from the highly prejudicial effect this type of evidence has on judges, juries, and lay-persons.").

9. *Hopkins*, 698 A.2d at 183.

10. See Hutton, *supra* note 3, at 616-17 (noting that since prior sexual-misconduct evidence does not fit within the traditional Rule 404(b) exceptions, often "imprecise or specious reasoning is offered in support" of trial judges pigeonholing the evidence under the plan, identity or intent exceptions).

11. See *Hopkins*, 698 A.2d at 185-87.

The American system of criminal justice presumes that (1) all people are innocent until proven guilty¹² and (2) courts can only convict a defendant if the evidence presented establishes the accused's guilt beyond a reasonable doubt.¹³ In order to promote these bedrock principles, Federal Rule 404(b), and in turn Rhode Island Rule 404(b), prohibit prosecutors from proffering prior bad-acts evidence to prove the defendant's propensity to commit the alleged crime.¹⁴ The rationale behind this prohibition is to protect

12. See *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *United States v. Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980) ("[C]oncomitant of the presumption of innocence," is that "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'"); see also Amber Donner-Froelich, *Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. Miami L. Rev. 217, 218 (1985) (noting that a basic tenet of the American criminal-justice system is that courts must presume that all defendants are innocent until proven guilty).

13. See, e.g., Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 130 n.6 (1993) (quoting remarks of Senator Verplanck, quoted in *People v. White*, 24 Wend. 561, 574 (N.Y. 1840)).

The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike "for the evil and the good, the just and the unjust." Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, profession, [sic] manners, upon the minds of honest and well-intentioned jurors.

Id.; see also *Greer v. United States*, 245 U.S. 559, 560 (1918) (noting that the court must consider the defendant innocent until the prosecution proves his or her guilt beyond a reasonable doubt); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 Suffolk U. L. Rev. 515, 515 (1995) (noting that "it is a basic tenet of American jurisprudence that in order to convict, the jury must find the defendant guilty beyond a reasonable doubt").

14. See *Michelson v. United States*, 335 U.S. 469, 476 (1948) (holding that "[t]he overriding policy of excluding such evidence . . . is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice"); *Boyd v. United States*, 142 U.S. 450, 458 (1892) (finding that extrinsic evidence of prior robberies is inadmissible to prove murder); *United States v. Mitchell*, 26 F. Cas. 1282, 1282 (C.C.D. Pa. 1795) (holding that due to the likelihood of unfair prejudice, prior bad-acts evidence is inadmissible); *State v. Colvin*, 425 A.2d 508, 511 (R.I. 1981) (holding that prosecutors cannot introduce uncharged prior bad-acts evidence to prove a defendant's propensity to commit the alleged crime); Amy E. Collier, Note, *State of Louisiana v. Jackson: Evidence of*

the defendant from the unfair prejudicial effect of evidence offered solely to establish the defendant's bad character instead of his actual guilt.¹⁵ Such evidence may tend to allow a jury to convict a defendant on less than probative and relevant evidence. Thirty-six states recognize some form of Federal Rule of Evidence 404(b)¹⁶—a rule that prohibits the use of character evidence to establish the

Allegations of Prior Sexual Abuse by Accused in an Intra-Family Context, 55 La. L. Rev. 1191, 1192 (1995) (noting that "[t]raditionally, English and American courts refused to admit evidence of a defendant's bad moral character in a criminal prosecution when offered to prove conduct on a particular occasion"). *But see* Hodge v. United States, 126 F.2d 849 (D.C. Cir. 1942) (allowing the admission of "other-crimes" evidence in prosecutions for sexual offenses to show similar mental dispositions).

15. See, e.g., *People v. Stout*, 4 Park. Crim. 71, 98 (N.Y. Sup. Ct. 1858) ("Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts, those which directly bear upon the crime charged against the prisoner, but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them."); see also Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 Syracuse L. Rev. 1125, 1137 (1993) (noting that the admission of prior bad-acts evidence might lure the jury into convicting the defendant even though the prosecution has not proven the defendant's guilt beyond a reasonable doubt).

16. See Reed, *supra* note 13, at 158-59. As of May 1, 1998, the following thirty-six states and two provinces had adopted the Uniform Rules of Evidence: Alaska R. Evid. 101 to 1101; Ariz. R. Evid. 101 to 1103; Ark. R. Evid. 101 to 1102; Colo. R. Evid. 101 to 1103 (West 1984); Del. R. Evid. 101 to 1103; Fla. Stat. Ann. §§ 90.101 to .958 (West 1979); Guam Civ. Code §§ 101 to 1102 (1988); Haw. R. Evid. 101 to 1102 (West 1989); Idaho R. Evid. 101 to 1103; Iowa R. Evid. 101 to 1103; Ky. R. Evid. 101 to 1104; La. Code. Evid. Ann. Arts. 101 to 1102 (West 1989); Me. R. Evid. 101 to 1103; Mich. R. Evid. 101 to 1102; Minn. R. Evid. 101 to 1101; Miss. R. Evid. 101 to 1103; Mont. R. Evid. 100 to 1008; Neb. Rev. Stat. §§ 27-101 to -1103 (1995); Nev. Rev. Stat. §§ 47.020 to 52.500 (1988); N.H. R. Evid. 100 to 1103; N.J. R. Evid. 101 to 1103; N.M. R. Evid. 11-101 to -1102; N.C. R. Evid. 8-1 to -103; N.D. R. Evid. 101 to 1103; Ohio R. Evid. 101 to 1103; Okla. Stat. Ann. Tit. 12, §§ 2101 to 3103 (West 1993); Or. Rev. Stat. §§ 40.010 to 40.585 (1988); P.R. Laws Ann. Tit. 32, app. IV, rules 1 to 84 (1988); R.I. R. Evid. 100 to 1008; S.D. Codified Laws Ann. §§ 19-9-1 to -18-9 (1995); Tenn. R. Evid. 100 to 1008; Tex. R. Civ. Evid. 101 to 1008; Utah R. Evid. 101 to 1103; Vt. R. Evid. 101 to 1103; Wash. R. Evid. 101 to 1103; W. Va. R. Evid. 101 to 1102; Wis. Stat. Ann. §§ 901.01 to 911.02 (West 1997); Wyo. R. Evid. 101 to 1104. California has a similar code which also allows uncharged prior bad-acts evidence. Cal. Evid. Code § 1101 (West 1995). The remaining fourteen states follow a common-law version of the Uniform Rules 404 and 405 which also allow the prosecution to present prior uncharged bad-acts evidence.

defendant's propensity to commit the alleged crime—as a tool to prevent jurors from ignoring these principles.¹⁷

Federal Rule 404(b) provides a number of well-established exceptions to its prohibition against the use of propensity evidence.¹⁸ Specifically, courts may admit prior bad-acts evidence when the prosecution offers the evidence solely for the other purpose of proving a fact that tends to establish that the accused committed the crime charged.¹⁹ The advisory committee notes for both the Federal and the Rhode Island Rules of Evidence recommend that courts should construe the other purposes articulated within Rule 404(b) narrowly because the admission of uncharged bad-acts evidence will severely deter a defendant's chance of facing an impartial jury.²⁰ Despite the warnings bestowed within the advisory committee notes, courts throughout the country, in response to society's increasing outrage towards sexual predators,²¹ continue to

17. See, e.g., *United States v. Sumner*, 119 F.3d 658, 660 (8th Cir. 1997) (recognizing that trial judges cannot admit prior misconduct evidence to establish the accused's "criminal disposition"); *United States v. Larson*, 112 F.3d 600, 604 (2nd Cir. 1997) (noting that courts cannot admit prior bad-acts evidence to prove the defendant's propensity to commit the charged crime); *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (holding that prior bad-acts evidence is not admissible to prove that a defendant is acting in conformity with his bad character); *United States v. Gometz*, 879 F.2d 256, 260-61 (7th Cir. 1989) (holding that trial judges cannot admit prior bad-acts evidence merely to establish the defendant's propensity to commit the charged crime). See generally Fed. R. Evid. 404 advisory committee's note. However, the prosecution may introduce character evidence when it is relevant for another purpose besides propensity. See, e.g., R.I. R. Evid. 404(b).

18. Fed. R. Evid. 404(b); see also R.I. R. Evid. 404(b) (acknowledging that courts may admit prior bad-acts evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake).

19. See Fed. R. Evid. 404(b).

20. See Fed. R. Evid. 404 advisory committee's note; see also Miguel A. Mendez & Edward J. Imwinkelried, *People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 Loy. L.A. L. Rev. 473, 474-75 (1995) (noting that in the 1960s, the Chicago Jury Project study concluded that juries tend only to presume that a defendant is innocent if the defendant does not have a prior criminal record) (citing Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 160-61, 178-79 (Univ. of Chicago Press 1971) (1966)); Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763, 777 (1961) ("The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.").

21. See Jeffrey G. Pickett, Note, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 Wash. L. Rev. 883, 901 (1995) (noting that due to "wide-

expand their respective interpretations of the other-purposes exceptions within evidentiary Rule 404(b). Specifically, by admitting virtually all prior sexual-misconduct evidence, many courts continue to expand Rule 404(b) to the point that the evidentiary exceptions nullify the rule.²²

Rhode Island courts also continue to nullify evidentiary Rule 404(b). In *State v. Hopkins*, the Rhode Island Supreme Court affirmed the trial court's admittance of prior bad-acts evidence under Rule 404(b)'s other-purposes exception.²³ In *Hopkins*, the complaining witness alleged that his stepfather sexually abused him repeatedly over a period of approximately four years.²⁴ Along with the testimony of the complaining witness, the trial judge permitted the prosecution to introduce evidence concerning prior uncharged bad-acts, e.g., allegations of previous sexual abuse committed by the defendant.²⁵ The court permitted the jury to hear testimony from two men, each of whom alleged that the defendant molested him when he was a child.²⁶ The trial judge admitted the prior uncharged bad-acts testimony despite the fact that these acts occurred approximately ten years earlier²⁷ and were not connected to the present criminal charges.²⁸ The trial judge admitted the prior uncharged bad-acts evidence first under the common-law lewd-disposition exception and second under the 404(b) other purpose of

spread contempt" the public has a "crusade" against accused sexual offenders); Jeannie Mayre Mar, *Washington's Expansion of the "Plan" Exception After State v. Lough*, 71 Wash. L. Rev. 845, 864 (1996); see also David P. Bryden & Roger C. Park, *Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion*, 141 Mil. L. Rev. 171, 171-72 (1993) (noting that the public became more interested in the use of prior bad-acts evidence in sex-offense cases after the televised rape trial of William Kennedy Smith in 1991).

22. See Colley, *supra* note 3, at 434 n.60; Mar, *supra* note 21, at 864 ("Commentators have noted a growing number of state laws granting more liberal admission of prior acts evidence in cases involving sex crimes.") (citing David J. Kaloyanides, Comment, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 Loy. L.A. L. Rev. 1297, 1307 (1992)).

23. *Hopkins*, 698 A.2d at 185.

24. *Id.* at 184.

25. See *id.* at 183.

26. See *id.*

27. See *id.* at 186 (noting that the abuse claimed by the two prosecution witnesses allegedly occurred approximately ten years before the abuse alleged by the complaining witness).

28. See *Hopkins*, 698 A.2d at 190 (Weisberger, C.J., dissenting).

plan.²⁹ More specifically, the court admitted the prior bad-acts testimony under the lewd-disposition and plan exceptions because the evidence demonstrated the defendant's tendency to molest young boys under his control.³⁰ Hopkins appealed his conviction. He contended that the trial judge committed a reversible error by improperly admitting this prior bad-acts evidence since the evidence prevented him from receiving a fair trial.³¹ The Rhode Island Supreme Court affirmed the lower court's decision to admit the prior bad-acts evidence under the lewd-disposition and plan exceptions,³² thus eviscerating the protections conferred by evidentiary Rule 404(b).

This Note analyzes the Rhode Island Supreme Court's affirmation of the *Hopkins* trial judge's decision to admit evidence of the defendant's uncharged prior bad acts under the lewd-disposition and plan exceptions. Moreover, this Note argues that the court improperly expanded the lewd-disposition and plan exceptions to the point that virtually all character evidence is admissible within sexual-molestation prosecutions. Part I briefly discusses Rhode Island Rule of Evidence 404(b). Part II first discusses the lewd-disposition exception in general and then examines its application in Rhode Island. Secondly, Part II discusses the application of the Rhode Island Rule of Evidence 404(b) plan exception. Part III discusses the procedural and factual history of the Rhode Island Supreme Court case of *State v. Hopkins*. Part IV proffers two arguments. First, the *Hopkins* court inappropriately expanded the lewd-disposition exception to allow dissimilar prior bad-acts testimony from third parties. Second, the *Hopkins* court misapplied the plan exception, thereby admitting highly prejudicial propensity evidence. Part V, in conclusion, reiterates that the Rhode Island Supreme Court misapplied the lewd-disposition exception and the plan exception, and thus fell victim to the theory that cases involving sexual misconduct merit special treatment under the law.

29. See *id.* at 184-85.

30. See *id.*

31. See *id.*

32. See *id.* at 183.

I. HISTORY OF RULE OF EVIDENCE 404(B)

A. *Rationale for 404(b) Prohibition*

In an attempt to limit the likelihood of courts unjustly convicting defendants, thirty-six states,³³ as well as the United States Congress, have adopted some form of Federal Rule of Evidence 404(b).³⁴ Specifically, evidentiary Rule 404(b) prohibits the introduction of prior misconduct evidence when the sole purpose of the evidence is to prove a defendant's propensity to commit the alleged crime.³⁵ The intent of Rule 404(b) is to prevent juries from leaping to assumptions of guilt based on the inference that the defendant is acting in conformity with that alleged bad character on a particular day.³⁶ Rather, the rule dictates that jurors must base their findings of guilt solely on the evidence presented pertaining to the charged crime.

Rhode Island Rule of Evidence 404(b) similarly prohibits uncharged prior bad-acts evidence for the purpose of proving the defendant's bad character.³⁷ Rhode Island Rule 404(b) provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.³⁸

33. See *supra* note 16.

34. Fed. R. Evid. 404(b). Congress enacted the Federal Rules of Evidence in 1975. But see Fed. R. Evid. 413, 414 (adopted by Congress in 1994).

35. See, e.g., Fed. R. Evid. 404(b); see also *United States v. Fosher*, 568 F.2d 207, 212 (1st Cir. 1978) (stating that prior bad-acts evidence is not admissible to prove propensity); *Donner-Froelich*, *supra* note 12, at 219.

36. See, e.g., *United States v. Sumner*, 119 F.3d 658, 661 (8th Cir. 1997) (holding that prior bad-acts evidence often is highly inflammatory and prejudicial); *United States v. Peden*, 961 F.2d 517, 520 (5th Cir. 1992) (recognizing that jurors are likely to convict a defendant even if the prosecution does not prove its case since they believe that the defendant is an abhorrent person who belongs in jail).

37. R.I. R. Evid. 404(b); see, e.g., *State v. Gallagher*, 654 A.2d 1206, 1210 (R.I. 1995) (noting that generally, prior uncharged bad-acts evidence is irrelevant and inadmissible); *State v. Lemon*, 497 A.2d 713, 720 (R.I. 1985) (recognizing that prior bad-acts evidence is not admissible to prove propensity); *State v. Sepe*, 410 A.2d 127, 130 (R.I. 1980) (noting that because evidence of prior bad-acts is so prejudicial, it is per se inadmissible to show propensity); *State v. Peters*, 136 A.2d 620, 621 (R.I. 1957) (acknowledging that the prosecution cannot use evidence of the defendant's prior bad-acts to prove the present alleged crime); *State v. Wright*, 36 A.2d 657, 660 (R.I. 1944) (recognizing that prior bad-acts evidence is generally not admissible to prove defendant's propensity to commit the charged crime).

38. R.I. R. Evid. 404(b).

Three public-policy principles underpin the adoption of Rhode Island Rule of Evidence 404(b). First, the Rhode Island Supreme Court, like Congress, adopted this rule to prevent jurors from unjustly convicting a defendant based on their presumptive belief that the accused is a bad person.³⁹ Specifically, jurors may wrongly conclude that it is their duty to remove the defendant from society, since he is a bad person, regardless of whether he is actually guilty of the crime charged.⁴⁰ Second, the Rhode Island Supreme Court adopted Rule 404(b) to prevent jurors from convicting a defendant based on their belief that the prior bad acts indicate an ongoing propensity in the accused to commit the charged crime.⁴¹ This rationale attempts to prevent jurors from placing undue weight on a defendant's prior uncharged misconduct.⁴² Finally, the Rhode Island Supreme Court adopted Rule 404(b) because a court's decision to admit prior uncharged misconduct

39. See *id.* advisory committee's note; see also *Gallagher*, 654 A.2d at 1210-11 (recognizing that jurors may presume a defendant is guilty based on the admission of prior bad-acts testimony); *State v. Haslam*, 663 A.2d 902, 912 (R.I. 1995) (acknowledging that the admission of prior sexual-misconduct evidence will likely make the jury hostile); *State v. Brown*, 626 A.2d 228, 233 (R.I. 1993) (noting that usually prior bad-acts evidence is inadmissible since its prejudicial value outweighs its probative value); *State v. Chartier*, 619 A.2d 1119, 1122 (R.I. 1993) (recognizing that jurors tend to presume prior sexual-misconduct evidence is indicative of whether the defendant committed the charged sexual offense); *State v. Powell*, 533 A.2d 530, 531 (R.I. 1987) (recognizing that prior bad-acts evidence "creates 'a real possibility that the generality of the jury's verdict will mask a finding of guilt that is based upon involvement with unrelated crimes rather than evidence offered to prove defendant's guilt of the crime charged'"); *State v. Jalette*, 382 A.2d 526, 532 (R.I. 1978) (noting that the admission of prior bad-acts evidence is likely to lead to unfair convictions since juries will base their determination of guilt on the defendant's prior bad behavior); *Collier*, *supra* note 14, at 1192 (recognizing that prior bad-acts evidence likely will lead to a defendant's conviction since the jury tends to believe that the defendant is a bad person); *Donner-Froelich*, *supra* note 12, at 220 (noting that juries tend to overestimate the probative value of prior bad-acts evidence and therefore, find the defendant guilty since he is supposedly a bad person).

40. See *Mar*, *supra* note 21, at 847.

41. See, e.g., *Gallagher*, 654 A.2d at 1210 (recognizing that there is a danger that the jury may assume that the defendant is guilty of the charged crime because he committed similar crimes in the past); *Collier*, *supra* note 14, at 1192 (noting that jurors may convict a defendant on the charged crime because he avoided punishment for his prior crimes); *Donner-Froelich*, *supra* note 12, at 220 (noting that prior bad-acts evidence "draws the jury's attention to the type of person the defendant is, thus tempting the jury to convict the defendant because he is a bad man, rather than because they believe the defendant is guilty of the charged crime").

42. See *Mar*, *supra* note 21, at 847.

evidence may impose an unreasonable burden on the defendant.⁴³ Such a ruling would unfairly force the accused not only to defend against the charged crime but also against an alleged act which purportedly transpired a number of years earlier.⁴⁴ This Note argues that the Rhode Island Supreme Court's decision in *Hopkins* ignores all three of Rule 404(b)'s purported purposes.

B. "Other-Purposes" Exceptions

Although Rhode Island Rule of Evidence 404(b) prohibits the introduction of character evidence to prove the defendant's propensity to commit bad acts,⁴⁵ such prior bad-acts evidence is admissible under exceptional circumstances, e.g., when proffered for some "other purpose."⁴⁶ Accordingly, Rule 404(b) additionally provides:

[Prior bad-acts evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or

43. See, e.g., *Haslam*, 663 A.2d at 912 (recognizing that prior bad-acts evidence is, by its very nature, likely to incite the jury's animosity); see also Collier, *supra* note 14, at 1192 (acknowledging that the admission of prior bad-acts evidence places a burden on the defendant).

44. See *id.*

45. R.I. R. Evid. 404(b); see also *State v. Brown*, 626 A.2d 228, 233 (R.I. 1993) (recognizing that prior bad-acts evidence is inadmissible because "the potential for creating prejudice in the minds of the jurors outweighs its probative value"); *State v. Woodson*, 551 A.2d 1187, 1193 (R.I. 1988) (noting that prosecutors generally cannot use evidence of prior uncharged bad acts to prove the defendant's propensity to commit the alleged crime).

46. See R.I. R. Evid. 404(b); see also, e.g., *Haslam*, 663 A.2d at 912 (noting that prior bad-acts evidence is admissible to prove something other than propensity); *State v. Stewart*, 663 A.2d 912, 923 (R.I. 1995) (recognizing that courts can admit prior bad-acts evidence "to show a fact or facts which tend to prove that the defendant is guilty of the crime charged"); *State v. Waite*, 665 A.2d 1338, 1339 (R.I. 1995) (noting that prior bad-acts evidence is admissible to show the defendant's motive, intent or plan); *State v. Powell*, 533 A.2d 530, 531 (R.I. 1987) (acknowledging that prior misconduct evidence may be admissible to prove the accused's "knowledge, intent, motive, design, plan or scheme"); *State v. Lemon*, 497 A.2d 713, 721 (R.I. 1985) (recognizing that other-crimes evidence may be admissible to prove a fact that tends to establish the defendant's guilt); *State v. Colvin*, 425 A.2d 508, 511 (R.I. 1981) (acknowledging that prior bad-acts evidence is admissible to prove plan, knowledge, intent or motive); *State v. DeWolf*, 402 A.2d 740, 744 (R.I. 1979) (noting that prior misconduct evidence may be admissible to prove motive, plan or intent); *State v. Jalette*, 382 A.2d 526, 532 (R.I. 1978) (noting that prior misconduct evidence may only be admissible if it is offered to prove something other than propensity); *State v. Colangelo*, 179 A. 147, 149 (R.I. 1935) (recognizing that other-crimes evidence may be admissible to establish the defendant's intent, motive or plan).

accident, or to prove that the defendant feared imminent bodily harm and that the fear was reasonable.⁴⁷

Rule 404(b)'s general rule of exclusion does not apply when the prosecution offers the prior bad-acts evidence to prove something other than character.⁴⁸ Provided the prosecution can compartmentalize the propensity evidence into one of these other-purpose exceptions, and the probative value of the evidence substantially outweighs its tendency to cause undue prejudice, confusion or waste of time, the evidence is admissible.⁴⁹ However, even when prior bad-acts evidence fits within a Rule 404(b) exception, the trial judge ought to exercise great caution when deciding whether to admit the evidence because prior misconduct evidence is inadmissible when it creates prejudice that may overwhelm the evidence's probative value.⁵⁰ Trial judges must couple all admissible prior bad-acts evidence with limiting instructions.⁵¹ These limit-

47. R.I. R. Evid. 404(b).

48. *Id.* This list of exceptions is not intended to be an exhaustive list. See *Woodson*, 551 A.2d at 1192; *State v. Bernier*, 491 A.2d 1000, 1004 (R.I. 1985); *Jalette*, 382 A.2d at 533.

49. See R.I. R. Evid. 403 ("[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see also *State v. Pignolet*, 465 A.2d 176, 185 (R.I. 1983) (Kelleher, J., dissenting) (recognizing that courts need to balance the danger of undue prejudice against the probative value of the prior bad-acts evidence when deciding whether to admit the evidence); (noting that "Professor Moore, in discussing the provisions of Fed. R. of Evidence 404(b) which relates to the use of evidence of other crimes, wrongs, or acts, emphasizes that before such evidence is admitted, the danger of undue prejudice to the defendant must be balanced against the probative value of the proffered evidence") (citing 10 James Wm. Moore et al., *Moore's Federal Practice* ¶ 404.21[2] at IV-114 (1982)).

50. See R.I. R. Evid. 402 (noting that trial judges need to balance the probative value of the evidence against the prejudicial value of the evidence before deciding whether to admit the offered evidence); see also *Mar*, *supra* note 21, at 864-65 (recognizing that prosecutors armed with evidentiary Rule 404(b) and the knowledge of the increasing number of state laws granting more expansive admission of prior bad-acts evidence in sex-crimes cases use sexual-offense evidence not to predict behavior, but to provide an inflammatory suggestion to the jury).

51. See, e.g., *State v. Ackerman*, 655 A.2d 688, 689 (R.I. 1995) (noting that when 404(b) evidence is admissible, the trial judge must provide a limiting instruction); *State v. Gallagher*, 654 A.2d 1206, 1210 (R.I. 1995) (holding that a limiting instruction must accompany the admission of prior uncharged bad-acts evidence); *Haslam*, 663 A.2d at 912 (recognizing that the trial judge's limiting instructions are a safeguard preventing the jury from using the prior bad-acts evidence improperly); *State v. Lamphere*, 658 A.2d 900, 904 (R.I. 1995) (holding that the court's failure to give limiting instructions regarding the admission of uncharged acts of

ing instructions facilitate the deliberation process and prevent the misapplication of evidence by alerting the jury to the exact 404(b) exception that the prosecution is offering the prior bad-acts evidence to prove.⁵²

II. THE ADMISSIBILITY OF CHARACTER EVIDENCE TO PROVE SOMETHING OTHER THAN CHARACTER

As a general principle, Rhode Island Rule of Evidence 404(b) prohibits the use of character evidence to prove that a defendant acted in accordance with his alleged bad character on a particular occasion.⁵³ Therefore, if the only purpose for a witness's testimony is to demonstrate the defendant's bad character, then the evidence is inadmissible.⁵⁴ However, if the prosecution offers character evi-

sexual misconduct, offered to show lewd disposition, created a reversible error); *State v. McVeigh*, 660 A.2d 269, 272 (R.I. 1995) (noting that the jury charge must specifically designate the limited purpose for admitting prior bad-acts evidence); *State v. Brown*, 626 A.2d 228, 233 (R.I. 1993) (recognizing the need for limiting instructions when prior uncharged bad-acts evidence is admissible); *State v. Lamoureux*, 623 A.2d 9, 13 (R.I. 1993) (noting that the trial judge must inform the jury to the specific purpose the prosecution is offering the prior bad-acts evidence).

52. See *supra* note 51.

53. See, e.g., *State v. Moulton*, No. 97-103-C.A., 1997 WL 775888, at *1 (R.I. Oct. 23, 1997) (acknowledging that trial judges cannot usually admit prior bad-acts evidence to establish whether the defendant is guilty of the charged crime); *State v. Gomes*, 690 A.2d 310, 316 (R.I. 1997) (recognizing that prior misconduct evidence is normally considered "so prejudicial that it is per se inadmissible"); *Haslam*, 663 A.2d at 911 (noting that normally evidence of prior crimes committed by the defendant is inadmissible); *Woodson*, 551 A.2d at 1193 (noting that usually prior bad-acts evidence is inadmissible to establish the defendant's propensity to commit the charged crime); *State v. Powell*, 533 A.2d 530, 531 (R.I. 1987) (noting that evidence of a previously committed crimes is "irrelevant and inadmissible"); *State v. Colvin*, 425 A.2d 508, 511 (R.I. 1981) (evidence of prior bad acts is inadmissible because it tends to unduly prejudice the defendant); *State v. Sepe*, 410 A.2d 127, 130 (R.I. 1980) (recognizing that trial judges should admit prior misconduct evidence sparingly because such evidence may unfairly prejudice the defendant).

54. In *Jalette*, the court stated that "another reason for this exclusionary principle is the prejudicial potential of such evidence, the real possibility that the generality of the jury's verdict may mask a finding of guilt which is based upon involvement with unrelated crimes rather than on the evidence which shows the defendant guilty of the crime charged." *Jalette*, 382 A.2d at 532 (citing *Spencer v. Texas*, 385 U.S. 554, 560 (1967)); see, e.g., *Lamphere*, 658 A.2d at 904 (noting that prior bad-acts evidence cannot be admitted to prove the defendant's propensity to commit bad acts); *Gallagher*, 654 A.2d at 1206 (recognizing that trial judges cannot admit prior misconduct evidence when it is only being offered to prove the defendant's propensity to commit the charged crime); *Colvin*, 425 A.2d at 511 (noting that evidence of prior misconduct is normally not admissible); *State v. Beaulieu*, 359 A.2d 689, 692 (R.I. 1979) (recognizing that prior bad-acts evidence is

dence to prove something other than the defendant's propensity to commit a particular act, then the evidence is admissible.⁵⁵ The reasoning behind the other-purposes exceptions is the notion that in certain instances the validity of the prosecution's reasons for offering the evidence outweighs the possibility of prejudice.⁵⁶ Rhode Island recognizes this reasoning as sound.

A. *The Admissibility of Character Evidence to Prove Lewd Disposition*

In addition to the other-purposes exceptions explicitly articulated within Rule 404(b), twenty-seven states and the District of Columbia recognize an exception designed specifically for prosecuting sex crimes.⁵⁷ This exception, termed the lewd-disposition ex-

generally not admissible); *State v. Aurgemma*, 358 A.2d 46, 50 (R.I. 1976) (noting that "evidence of other and distinct criminal acts is generally prejudicial and inadmissible"); *State v. Mastracchio*, 312 A.2d 190, 194 (R.I. 1973) (recognizing that evidence of prior bad-acts is not admissible to establish the defendant's guilt); *State v. Mazzearella*, 236 A.2d 446, 449 (R.I. 1967) (noting that generally prior criminal-misconduct evidence is inadmissible to prove the defendant's guilt); *State v. Colangelo*, 179 A. 147, 149 (R.I. 1935) (noting that usually prior bad-acts evidence is inadmissible because it will unfairly prejudice the defendant).

55. See, e.g., *Beaulieu*, 359 A.2d at 692 (recognizing that prior bad-acts evidence may be admissible if the evidence "tends to establish guilty knowledge, intent, motive, design, plan, scheme, system, or the like"); *Mazzearella*, 236 A.2d at 449 (acknowledging that prior bad-acts evidence may be admitted to establish the defendant's criminal intent); *Colangelo*, 179 A. at 149 (noting that prior bad-acts evidence may be admissible if the bad acts are "interwoven with the offense for which the defendant is being tried"); *State v. Horton*, 133 A. 236, 239 (R.I. 1926) (noting that evidence of other prior bad acts may be admissible to prove the accused's intent to commit the charged crime).

56. See *Jalette*, 382 A.2d at 532.

57. See *Reed*, *supra* note 13, at 159 n.180 (noting that the following states admit prior bad-acts evidence under the lewd-disposition exception: Alaska: *Soper v. State*, 731 P.2d 587, 590 (Alaska Ct. App. 1987); Arizona: *State v. Beck*, 726 P.2d 227, 231 (Ariz. Ct. App. 1986); Arkansas: *Free v. State*, 732 S.W.2d 452, 455 (Ark. 1987); California: *People v. Stewart*, 226 Cal. Rptr. 252, 255 (Cal. Ct. App. 1986); District of Columbia: *Pounds v. United States*, 529 A.2d 791, 794 (D.C. 1987); Georgia: *Rogers v. State*, 401 S.E.2d 735, 736 (Ga. 1991); Idaho: *State v. Schwartzmiller*, 685 P.2d 830, 834 (Idaho 1984); Iowa: *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988); Kansas: *State v. Damewood*, 783 P.2d 1249, 1256 (Kan. 1989); Kentucky: *Thacker v. Commonwealth*, 816 S.W.2d 660 (Ky. Ct. App. 1991); Louisiana: *State v. Howard*, 520 So. 2d 1150, 1152 (La. Ct. App. 1987); Massachusetts: *Commonwealth v. King*, 441 N.E.2d 248, 251 (Mass. 1982); Mississippi: *Coates v. State*, 495 So. 2d 464, 468 (Miss. 1986); Missouri: *State v. Graham*, 641 S.W.2d 102, 105 (Mo. 1986); Nebraska: *State v. Craig*, 361 N.W.2d 206, 213 (Neb. 1985); Nevada: *McMichael v. State*, 577 P.2d 398, 400 (Nev. 1978); New Mexico: *State v. Mankiller*, 722 P.2d 1183, 1191 (N.M. Ct. App. 1986); Penn-

ception,⁵⁸ allows the prosecution to present evidence of an accused sex offender's prior sexual misconduct in its case-in-chief as a means to establish the defendant's inclination to commit sex crimes.⁵⁹ Proponents of the lewd-disposition exception assert two public-policy reasons for adopting this special character-evidence exception: (1) to curtail the high rate of recidivism in child-moles-

sylvania: *Commonwealth v. McLucas*, 516 A.2d 68, 71 (Pa. Super. Ct. 1986); Rhode Island: *State v. Tobin*, 602 A.2d 528, 531 (R.I. 1992); South Dakota: *State v. Champagne*, 422 N.W.2d 840, 841-44 (S.D. 1988); Texas: *Boutwell v. State*, 719 S.W.2d 164, 174-79 (Tex. Crim. App. 1985); Utah: *State v. Neel*, 65 P. 494, 495 (Utah 1908); Vermont: *State v. Cardinal*, 584 A.2d 1152, 1155 (Vt. 1981); Virginia: *Moore v. Commonwealth*, 278 S.E.2d 822, 825 (Va. 1981); Washington: *State v. Ray*, 806 P.2d 1220, 1229 (Wash. 1991); West Virginia: *In re Carlita B.*, 408 S.E.2d 365, 382 (W. Va. 1991); Wisconsin: *State v. Friederich*, 398 N.W.2d 763, 771-74 (Wis. 1987); Wyoming: *Maniken v. State*, 737 P.2d 345, 346-47 (Wyo. 1987)). However, Delaware, Indiana, Kentucky, New York and Oregon have eliminated their versions of the lewd-disposition exception within the last ten years. *See id.* at 218 (citing *Getz v. State*, 538 A.2d 726, 734 (Del. 1988); *Lannon v. State*, 600 N.E.2d 1334, 1338-39 (Ind. 1992); *Pendleton v. Commonwealth*, 685 S.W.2d 549, 552 (Ky. 1985); *People v. Lewis*, 506 N.E.2d 915, 916-17 (N.Y. 1987); *State v. Zybach*, 761 P.2d 1334 (Or. App. 1988)).

58. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 557 (1997) (noting that the lewd-disposition exception is also referred to as "lustful disposition," "lascivious disposition" or "depraved sexual instinct").

59. *See Reed, supra*, note 13, at 218; *see also* *United States v. Yellow*, 18 F.3d 1438, 1441 (8th Cir. 1994) (recognizing that prior sexual-misconduct evidence may be admissible to show the defendant's need to gratify his sexual craving); *Staggers v. State*, 172 S.E.2d 462, 464 (Ga. 1969) (stating that uncharged bad-acts evidence may be admissible to show defendant's intent to use his children to satisfy his sexual desires). *But see* *State v. Lucero*, 840 P.2d 1255, 1258-59 (N.M. Ct. App. 1992) (holding that in essence, the lewd-disposition exception is nothing more than an euphemism for admitting the propensity evidence which evidentiary Rule 404(b) is intended to keep out); *see also* Mary Katherine Danna, Note, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 St. Louis U. L.J. 277, 283 (1996) (recognizing that "the [lewd]-disposition exception is a true disregarding of the character evidence ban where sex offenses are charged because the courts, in employing the exception, make no pretense about the purpose for which jurors can use the uncharged misconduct evidence: the evidence goes directly to the issue of the defendant's character").

tation cases⁶⁰ and (2) to enhance the credibility of the testimony of a child victim-witness.⁶¹

First, proponents of the lewd-disposition exception assert that sexual-molestation prosecutions warrant a special exception because of the high recidivism rate among child molesters.⁶² Advocates further argue that a degeneracy among sex offenders causes the high recidivism rate.⁶³ Therefore, this particular type of character evidence regarding possible prior sex offenses is relevant be-

60. In 1989, the Bureau of Justice released a statistics report on the recidivism rate of convicted criminals. The study followed 100,00 prisoners for three years after release. The results concluded that the recidivism rate for sex offenders is lower than that for most crimes.

- Burglars: 31.9% re-arrested
- Drug offenders: 24.8% re-arrested
- Violent robbers: 19.6% re-arrested
- Rapists: 7.7% re-arrested

Allen J. Beck, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, 1 (1989). *But see* Karen M. Finger, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. Cal. Rev. L. & Women's Stud. 501, 536 (1996) (recognizing that since sex crimes often go unreported and few perpetrators ever get caught, the number of repeat sexual offenders is probably much higher than the surveys suggest); A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinq. 450 (1982) (noting that proponents of the lewd-disposition exception argue that statistics which show that the recidivism rate of sex offenders is lower than that of other crimes misrepresent reality).

61. *See, e.g.*, *Lannon v. State*, 600 N.E.2d 1334, 1335 (Ind. 1992) (recognizing that courts originally adopted the lewd-disposition exception in order to "lend credence to a victim's accusations or testimony which describe acts which would otherwise 'seem improbable standing alone'").

62. *See supra* note 60. *But see Lannon*, 600 N.E.2d at 1336-37 (holding that, despite the high rate of recidivism among sexual offenders, the rate is also high for drug offenders, and therefore, sex offenders are not unique enough to warrant a special exception); Imwinkelried, *supra* note 1, at 298 (noting that there is nothing particularly special about sex crimes which would warrant singling them out for a unique rule which would allow courts to admit uncharged prior bad-acts evidence more leniently than in drug transactions or possession of stolen property prosecutions); Mar, *supra* note 21, at 864-65 (noting that "the fact remains that the probability of predicting the recurrence of rape is no better than [the probability of] predicting the reoccurrence of murder"); *see also* Reed, *supra* note 13, at 155 (recognizing that the "reported recidivism rates for exhibitionists, pedophiles and adolescent child abusers is about thirty percent").

63. *See State v. Jackson*, 81 N.E.2d 546, 548 (Ohio App. 1948). *See generally* Bowden v. State, 538 So. 2d 1226, 1234-35 (Ala. 1988) (noting that the defendant's continual assaults against the complaining witness resulted from the defendant's "sexual passion for the victim"); *State v. Weatherbee*, 762 P.2d 590, 591-92 (Ariz. Ct. App. 1988) (noting that the defendant had a lewd disposition towards sexually assaulting his daughters).

cause it demonstrates that a defendant has a propensity for aberrant sexual misconduct, thus making it more likely than not that the accused committed the charged crime.⁶⁴

Second, proponents of the lewd-disposition exception argue that cases dealing with sexual molestation warrant a "greater latitude of proof" as to prior bad acts⁶⁵ in order to "level the playing field by bolstering the testimony of a solitary child victim-witness."⁶⁶ The proffered argument is that, since most sexual assaults occur in private with no witnesses and with little physical evidence, a distinct exception is necessary in order to secure convictions in these cases where proof of guilt beyond a reasonable doubt would otherwise prove unduly difficult for the prosecution.⁶⁷ Furthermore, in sexual-molestation prosecutions, a credibility question usually exists because a young victim is challenging the trustworthiness of the adult defendant.⁶⁸ Advocates argue that the lewd-disposition exception is necessary in order to avoid swearing contests between the complaining witness and defendant.⁶⁹ While Rhode Island accepts both of these justifications as legitimate reasons for adopting the lewd-disposition exception, this Note demonstrates that the lewd-disposition exception is inapplicable in *Hopkins* because the Rhode Island Supreme Court misapplied the Rule 404(b) exception.

64. Segal, *supra* note 13, at 526-27.

65. *State v. Friedrich*, 398 N.W.2d 763, 771 (Wis. 1987).

66. *Lannon*, 600 N.E.2d at 1335.

67. See, e.g., Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 Crim L.F. 307, 317 (1993). But see *id.* (recognizing that "there are other offenses, such as theft, that often occur in a clandestine fashion").

68. See *People v. Covert*, 57 Cal. Rptr. 220, 224 (Cal. App. 1967); *State v. Jackson*, 81 N.E.2d 546, 548 (Ohio Ct. App. 1948); *Hendrickson v. State*, 212 N.W.2d 481, 483 (Wis. 1973). But see, e.g., *Lannon*, 600 N.E.2d at 1337-1338 (holding that the need to bolster the testimony of the child witness does not present a rational basis for creating a special exception to the rule against character evidence since "accusations of child molestation no longer appear improbable"); *Alexander v. State*, 753 S.W.2d 401 (Tex. Ct. App. 1988) (holding that evidence of prior misconduct by the defendant against a six-year old girl is not admissible at the defendant's trial for molesting a four-year old girl, despite the fact that the defendant's wife cared for both children); *State v. McCarthy*, 589 A.2d 869 (Vt. 1991) (holding that it was a reversible error to admit evidence regarding the defendant's alleged sexual assault against one child when the defendant was being tried for molesting another child).

69. See *Gezzi v. State*, 780 P.2d 972 (Wyo. 1989); see also Beale, *supra* note 67, at 317 (noting that since sexual assaults often occur in private, cases often turn into credibility contests between the complaining witness and the defendant).

1. *The Lewd-Disposition Exception in Rhode Island: The Jalette Test*

In the seminal case *State v. Jalette*,⁷⁰ the Rhode Island Supreme Court addressed the issue of the admissibility of prior bad-acts evidence under the lewd-disposition exception in sexual-molestation prosecutions.⁷¹ In *Jalette*, the trial judge permitted the mother of the complaining witness to testify about the occurrence and details of a prior uncharged sexual assault by the defendant, her husband, against the complaining witness.⁷² The supreme court affirmed this admission of the prior bad-acts evidence, holding that the testimony demonstrated the defendant's lewd disposition towards his daughter.⁷³ Since the applicability of the lewd-disposition exception in *Jalette* was a question of first impression, the court carefully articulated when courts may admit prior bad-acts evidence under this exception.⁷⁴

First, the *Jalette* court restricted the admissibility of lewd-disposition evidence to "evidence of other not too remote sex crimes with the particular person concerned in the crime on trial."⁷⁵ The court explained that "not too remote sex crimes" only include prior crimes committed against the complaining witness.⁷⁶ Therefore, courts may only admit evidence of prior bad acts committed against a third party to prove an exception specifically articulated within Rule 404(b), and not under the lewd-disposition exception.⁷⁷

Second, recognizing that the admission of other-crimes evidence poses a substantial risk to a defendant's right to a fair

70. 382 A.2d 526 (R.I. 1978).

71. See *Jalette*, 382 A.2d at 533 (holding that "in case[s] of sexual assault, this list of exceptions was also expanded to allow evidence of past conduct to show the defendant's lewd disposition . . . toward the prosecuting witness").

72. *Id.* at 531.

73. *Id.* at 533-34 (noting that the court vacated and remanded the defendant's conviction since the trial judge committed a reversible error by admitting hearsay evidence).

74. *Id.*

75. *Id.* at 533 (quoting *People v. Kelly*, 424 P.2d 947, 954-56 (Cal. 1967)).

76. *Jalette*, 382 A.2d at 533.

77. See *id.* (holding that "evidence that the accused committed nonremote similar sexual offenses with persons other than the victim may be admitted to prove the presence of the traditional exceptions to the general rule, such as intent or motive"); see also *State v. Lamoureux*, 623 A.2d 9, 13 (R.I. 1993) (noting that "[m]ere weakness of the prosecution's case is insufficient reason to admit irrelevant and prejudicial evidence").

trial,⁷⁸ the supreme court further restricted the use of the lewd-disposition exception.⁷⁹ This further restriction is threefold. First, courts should admit evidence "sparingly"⁸⁰ and only when "reasonably necessary,"⁸¹ and should exclude the evidence when it is simply "cumulative."⁸² Second, courts may only admit the prior bad-acts evidence when the evidence is relevant to establishing the charges against the defendant.⁸³ Third, courts must indicate with particularity the exact exception to which the prior bad-acts evidence is relevant, and the trial judge must instruct the jury regarding the limited use of the evidence.⁸⁴

After *Jalette*, Rhode Island recognized the lewd-disposition exception. However, due to the court's apparent apprehension regarding the validity of the lewd-disposition exception, the court provided these clear confines for trial judges to observe.⁸⁵ Moreover, the court stressed that, since only evidence of uncharged bad-acts committed against the complaining witness can demonstrate the defendant's lustful and abhorrent disposition toward that spe-

78. See *Jalette*, 382 A.2d at 533 (noting that "evidence of other sexual behavior is, by its very nature, uniquely apt to arouse the jury's hostility").

79. See *id.*

80. *Id.*; see also *State v. Gallagher*, 654 A.2d 1206, 1210 (R.I. 1995) (holding that courts should exercise great caution when deciding whether to admit prior bad-acts evidence); *State v. Santos*, 413 A.2d 58, 71 (R.I. 1980) (noting that courts should admit prior uncharged bad-acts evidence with caution and the evidence should be admitted sparingly).

81. *Jalette*, 382 A.2d at 533; see also *State v. Cardoza*, 465 A.2d 200, 202 (R.I. 1983) (noting that courts should only admit prior bad-acts evidence that is reasonably necessary).

82. *Jalette*, 382 A.2d at 533 (citing *Commonwealth v. Boulden*, 116 A.2d 867, 874 (Pa. Super. 1955) (acknowledging that, since "sex offenders are no more likely to repeat than other offenders . . . there is no more reason to admit prior offenses to show depravity or propensity in a sex case than in any other case")); see also *Cardoza*, 465 A.2d at 202 (acknowledging that trial judges should not admit prior bad-acts evidence that is "merely cumulative").

83. See *Jalette*, 382 A.2d at 533.

84. See *id.*

85. See *id.* at 532-533 (recognizing that prior bad-acts evidence can hinder the defendant's chances of receiving a fair trial and therefore courts should admit such evidence sparingly). The court also noted that the lewd-disposition exception is questionable since it creates a specific exception for sex-offenders even though their recidivism rate is no higher than the recidivism rate for other criminals. See *id.* at 532 (citing *Boulden*, 116 A.2d at 874).

cific person, evidence of bad acts committed against others is irrelevant.⁸⁶

2. *Rhode Island's Continued Expansion of the Lewd-Disposition Exception: The Pignolet Test*

Until *State v. Pignolet*,⁸⁷ the Rhode Island Supreme Court consistently applied and adhered to the *Jalette* holding. In *Pignolet*, the supreme court reaffirmed and expanded the *Jalette* lewd-disposition exception. Specifically, in addition to reaffirming the admission of prior uncharged bad-acts evidence committed against the complaining witness, *Pignolet* expanded the exception to permit third-party testimony regarding prior uncharged bad acts committed against *other* persons.⁸⁸ In *Pignolet*, the trial court permitted the prosecution to present testimony from the victim's older step-sister regarding prior uncharged sexual misconduct of the defendant, the complaining witness's father.⁸⁹ The witness testified that she was also a victim of their father's sexual advances on three separate occasions.⁹⁰ The supreme court affirmed the trial court's admission of the uncharged sexual-misconduct testimony.⁹¹ The court reasoned that the prior incidents "are relevant, material, and highly probative" of the accused's lustful disposition toward young girls over whom he exercised supervision and authority.⁹²

After *Pignolet*, "not too remote sex crimes" may include sexual acts committed against someone besides the complaining wit-

86. See *id.* at 532; see also, e.g., *People v. Kelly*, 424 P.2d 947, 955 (Cal. 1967) (noting that trial judges can only admit prior sexual-misconduct evidence with the complaining witness under the lewd-disposition exception, since only this type of evidence shows the defendant's lewd disposition toward the complaining witness); *People v. Greeley*, 152 N.E.2d 825, 827 (Ill. 1958) (acknowledging that prior sexual misconduct against the complaining witness may be admissible); *State v. Beckwith*, 180 A.2d 605, 607 (Me. 1962) (noting that trial judges may admit prior bad-acts evidence pertaining to the complaining witness); *Berger v. State*, 20 A.2d 146, 148 (Md. 1941) (noting that prior sexual-misconduct evidence may be admissible when the defendant allegedly committed the prior act against the complaining witness); *State v. Di Giosia*, 70 A.2d 756, 759-60 (N.J. 1950) (acknowledging that evidence of prior bad acts against the complaining witness may be admissible to show the defendant's "amorous inclination").

87. 465 A.2d 176 (R.I. 1983).

88. See Segal, *supra* note 13, at 532.

89. *Pignolet*, 465 A.2d at 179.

90. See *id.*

91. See *id.* at 182.

92. *Id.*

ness.⁹³ In *Pignolet*, the Rhode Island Supreme Court expanded the intent of the *Jalette* language "not too remote sex crimes" by relying on the analysis put forth in *State v. Colangelo*.⁹⁴ *Colangelo* held that the court may admit prior uncharged bad-acts evidence if the evidence was "interwoven with the offense for which the defendant [was] tried."⁹⁵ The *Pignolet* court interpreted this "interwoven" language to mean that evidence is interwoven, and thus admissible under the lewd-disposition exception, if six conditions are met. Specifically, the prosecution must demonstrate that the alleged bad acts committed against the complaining witness and the alleged bad acts committed against the third party occurred: (1) during the same time frame, (2) at a similar place, (3) with children of approximately the same age, (4) who shared a home, (5) using the same type of sexual contact and (6) with familiarly related children.⁹⁶ In *Pignolet*, the complaining witness and the third-party witness were stepsisters, were approximately the same age⁹⁷ and lived together in the same family home.⁹⁸ Each witness alleged that during the same time frame,⁹⁹ the defendant sexually assaulted them in the family home, late at night, while their mother was working and when their other siblings were sleeping.¹⁰⁰ In addition, each witness claimed that the defendant threatened physical harm if she did not comply with the defendant's sexual demands.¹⁰¹ The trial court admitted the prior bad-acts testimony under the lewd-disposition exception.¹⁰² The supreme court affirmed the trial court's holding, reasoning that since the prosecution satisfied the six-prong test, the trial court appropriately admitted the third-party prior bad-acts evidence for the purpose of

93. *Id.* at 182.

94. *See id.* (citing *Colangelo*, 179 A. at 149).

95. *Colangelo*, 179 A. at 149.

96. *Pignolet*, 465 A.2d at 181.

97. *Id.* at 178-79 (noting that the complaining witness alleged that the defendant began molesting her when she was fourteen-years old and her stepsister alleged that the defendant began molesting her when she was nine-years old).

98. *Id.* at 180-82.

99. *See id.* at 176-79 (noting that the complaining witness claimed that the defendant began abusing her in 1979 and that her stepsister claimed that the defendant began abusing her in 1976).

100. *See id.* at 181.

101. *See id.* at 180-82.

102. *See id.* at 178 (noting that the trial judge admitted the prior bad-acts evidence "because it tended to show a lewd or wanton predisposition . . . on the part of the defendant toward his two stepdaughters").

demonstrating the defendant's lewd disposition towards his stepdaughters.¹⁰³

Justice Kelleher, author of the *Jalette* opinion, adamantly dissented from the majority opinion in *Pignolet*. He stated that his "basic disagreement with the majority stems from [his] belief that the rationale that led to *Jalette* has been laid to its eternal rest without benefit of so much as a eulogy."¹⁰⁴ Specifically, Justice Kelleher reasoned that the court's erroneous use of the "interwoven" language effectively discarded the *Jalette* mandate that the prosecution must specify a precise, traditional 404(b) exception in order to admit evidence of prior bad acts allegedly committed by the defendant against third parties.¹⁰⁵ Therefore, Justice Kelleher concluded that, because the prosecution did not specify a precise traditional 404(b) exception to which the prior bad-act evidence was relevant, the evidence was solely propensity evidence.¹⁰⁶ The Rhode Island Supreme Court still attempts to follow the *Pignolet* test. Although review of Justice Kelleher's dissenting opinion in

103. See *id.* at 182 (noting that the court admitted the prior bad-acts evidence after reasoning that the evidence complied with the three restrictions articulated in *Jalette*).

104. *Id.* at 184-85 (Bevilacqua, C.J. & Kelleher, J., dissenting) ("*Jalette* was written for the express purpose of barring the indiscriminate use of evidence of 'other crimes' since such evidence presents a substantial risk to an accused's right to a fair trial, especially when the other evidence suggests sexual misconduct.>").

105. See *id.* at 184-86; see also Donner-Froelich, *supra* note 12, at 230-31 (recognizing that the holding in *Pignolet* discarded the *Jalette* court's requirement that trial judges may only admit prior bad-acts evidence against third parties according to the specified 404(b) exceptions).

106. See Donner-Froelich, *supra* note 12, at 231. The *Pignolet* court incorrectly applied the *Jalette* test for determining the admissibility of uncharged bad-acts evidence because, as Justice Kelleher and Chief Justice Bevilacqua noted in dissent, "at no time did the trial justice give any consideration to the necessity for presenting [the sister's] testimony." *Id.* (quoting *Pignolet*, 465 A.2d at 185 (Bevilacqua, C.J., Kelleher, J., dissenting)). In addition, even if the court did take into account the necessity of the prior bad-acts evidence, the court's standard of review makes the *Jalette* precondition for admissibility worthless. The majority in *Pignolet* held that the trial court inquired into the necessity of the prior bad-acts evidence simply because (1) "[t]he prosecutor represented to the court that she believed the evidence of the sister was necessary to meet the state's burden of proof," and (2) the sister's testimony would have been admissible on rebuttal if the defendant testified. *Id.* at 231 n.93 (quoting *Pignolet*, 465 A.2d at 182). If the only test to determine whether prior uncharged bad-acts evidence is admissible is to ask the prosecution if it thinks the testimony is necessary to meet the burden of proof required for a conviction, then the *Jalette* test is meaningless.

Pignolet suggests an error in the court's reasoning, this Note does not consider that quandary in depth.

After *Pignolet*, Rhode Island had a new, expansive lewd-disposition exception.¹⁰⁷ Courts could consider admitting prior uncharged sexual-misconduct evidence if any one of three conditions existed: (1) if the defendant purportedly committed the alleged, uncharged "not too remote sex crime" against the complaining witness and a third party testified about the abuse;¹⁰⁸ (2) if the defendant purportedly committed the alleged, uncharged "not too remote sex crime" against the complaining witness and the complaining witness testified about the abuse¹⁰⁹ or (3) if the defendant committed the alleged uncharged "not too remote sex crime" against a third party and the third party testified about the abuse.¹¹⁰ While the Rhode Island Supreme Court follows the misguided *Pignolet* approach, this Note demonstrates that the court misapplied the *Pignolet* standard in *Hopkins* and rendered an improper result.

3. *The Quattrocchi Test: Limiting Pignolet*

In *State v. Quattrocchi*,¹¹¹ the Rhode Island Supreme Court again revisited the lewd-disposition exception. In *Quattrocchi*, the defendant was tried and convicted for sexually assaulting his ex-

107. In 1992, Rhode Island's application of the lewd-disposition exception was directly challenged in *State v. Tobin*, 602 A.2d 528, 530 (R.I. 1992). The defense argued that the exception was overruled by the state's adoption of the 1987 Rhode Island Rules of Evidence because Rule 404(b) makes no reference to the lewd-disposition exception. *Id.* at 531-32. The court held the exception existed outside the confines of the evidentiary rule and was supported by a long line of multi-state authority. *See id.* at 531 (citing Edward J. Imwinkelried, Uncharged Misconduct Evidence § 4:18, at 50 (1984); Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.22[1][c], at 404-79 (1989)).

108. *Jalette*, 382 A.2d at 533.

109. *State v. Cardoza*, 465 A.2d 200, 203 (R.I. 1983) (holding that the court was extending the lewd-disposition exception to cover testimony by the complaining witness regarding uncharged bad acts committed by the defendant against oneself since it is admissible to prove the defendant's lewd disposition towards the complaining witness).

110. *Pignolet*, 465 A.2d at 181 (holding that "not too remote sex crimes" meant "closely related in time, place, age, family relationships of the victims and the form of sexual acts"); *see also Jalette*, 382 A.2d at 533 (holding that after establishing the threshold requirement for potential admissibility, the court must subject the proffered evidence to the three articulated restrictions to determine whether admitting the evidence will unfairly prejudice the defendant).

111. 681 A.2d 879 (R.I. 1996).

girlfriend's daughter for approximately ten years.¹¹² During the trial, the trial judge permitted the prosecution to present testimony regarding two alleged, uncharged sexual assaults by the defendant against two girls.¹¹³ Despite the fact that no family relationship existed between the three alleged victims and none of the three witnesses lived together, the trial court admitted the prior bad-acts evidence under the lewd-disposition exception.¹¹⁴ The trial court found the defendant guilty of two counts of first-degree sexual assault.¹¹⁵ Quattrocchi appealed his conviction, claiming that the admission of the prior bad-acts testimony violated Rule 404(b) because the prosecution offered the evidence solely to prove his propensity to commit sex crimes.¹¹⁶ Quattrocchi claimed that the trial court thereby committed a reversible error by denying him a fair trial.¹¹⁷ On appeal, the supreme court held that due to the extreme prejudicial nature of the third-party prior bad-acts evidence, the trial judge's decision to admit the evidence was a reversible error.¹¹⁸

The *Quattrocchi* court needed to re-examine the *Pignolet* doctrine in order to determine whether the trial court committed a reversible error by admitting the prior bad-acts evidence. The supreme court first re-affirmed the *Pignolet* holding by stating that in certain circumstances, the court may admit evidence regarding the defendant's non-remote prior bad acts allegedly committed against someone other than the complaining witness.¹¹⁹ Specifically, the court mandated that the admissibility of such prior bad-acts evidence, according to *Pignolet*, is contingent on both the complaining witness and the third-party witness living in the same house at the time of the alleged assaults.¹²⁰ The court refused to expand the lewd-disposition exception to encompass testimony

112. *Id.* at 880.

113. *See id.* at 884-85.

114. *See id.* at 885-86 (noting that one prior bad-acts witness was the defendant's godchild and the other witness was the defendant's neighbor).

115. *See id.* at 879.

116. *See id.* at 885.

117. *See id.*

118. *See id.* at 887.

119. *See id.* at 885-86.

120. *See id.* (emphasizing that the *Pignolet* court properly admitted the third-party prior bad-acts evidence "since both children lived in the same house with the defendant and that all but one of the sexual acts took place during the same interval").

from third parties living outside the household of the complaining witness since such evidence is likely to prejudice the defendant unfairly.¹²¹

The *Quattrocchi* court further held that the facts of *Pignolet* were the extreme upon which it was willing to admit third-party uncharged bad-acts evidence under the lewd-disposition exception since prior bad-acts evidence can be overwhelmingly prejudicial to the accused.¹²² Specifically, the *Quattrocchi* court recognized that juries often perceive prior bad-acts evidence as proof that the accused is a bad person who has a propensity toward sexual molestation and, therefore, must be guilty of the charged offense.¹²³ Acknowledging that prior sexual-misconduct evidence is extremely prejudicial, the court also held that any expansion of the *Pignolet* test "would . . . have the effect of superseding Rule 404(b) in respect to sexual assault charges."¹²⁴ Thus, in sexual-molestation prosecutions, if the prosecution does not satisfy all six prongs of the *Pignolet* test, then the third-party prior bad-acts evidence is inadmissible.¹²⁵ It is reassuring to defense attorneys that the court ended its expansion of Rule 404(b)'s lewd-disposition exception with its *Quattrocchi* decision.

B. *The Admissibility of Character Evidence to Prove Plan*

Jalette, in addition to limiting the application of the lewd-disposition exception, further held that trial judges may admit prior bad-acts evidence if the evidence is necessary to establish one of the traditional 404(b) exceptions.¹²⁶ Rhode Island Rule of Evidence 404(b) explicitly states that plan is one of the accepted other purposes for admitting uncharged prior bad-acts evidence.¹²⁷ The plan exception is a mechanism for admitting prior bad-acts evi-

121. See *id.* at 886; see also *State v. Gomes*, 690 A.2d 310, 317 (R.I. 1997) (noting that the court refused to expand the lewd-disposition exception to allow testimony from alleged victims who did not live with the complaining witness).

122. *Quattrocchi*, 681 A.2d at 886.

123. *Id.*

124. *Id.*

125. See *id.* (noting that this definition is supported in other jurisdictions).

126. *Jalette*, 382 A.2d at 533.

127. R.I. R. Evid. 404(b); see also Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute Over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. Kan. L. Rev. 1005, 1007 (1995) (noting that Rule 404(b) explicitly mentions "plan" as a relevant reason for admitting prior bad-acts evidence).

dence so that the jury has a complete picture of what transpired during the crime charged.¹²⁸ Moreover, courts can use the exception to admit evidence of the accused's prior bad acts as a means of establishing that the defendant had an elaborate plan to perpetrate the crime charged.¹²⁹

Like all Rule 404(b) exceptions, the plan exception was created by the drafters of the evidentiary rules with the intent that courts construe the exception narrowly so as to limit the prejudicial effect resulting from the admission of propensity evidence.¹³⁰ However, in sexual-molestation prosecutions, despite the fact that the link between the prior bad-acts evidence and the crime charged is rather attenuated, courts often admit the prior bad-acts evidence comparatively broadly under the plan exception.¹³¹ Currently, two contrasting interpretations of the plan exception exist: (1) the true-plan theory and (2) the spurious-plan or pattern-of-criminality theory.¹³² The former limits the application of the plan exception, while the latter makes the plan exception all-encompassing.

1. *True-Plan Theory*

The true-plan theory is the traditional, narrow interpretation of the plan exception.¹³³ This interpretation permits courts to ad-

128. See Mar, *supra* note 21, at 848.

129. See *id.*

130. See generally Fed. R. Evid. 404 advisory committee's note (recognizing that in general, evidence of prior bad acts is prejudicial and inadmissible); see also State v. Gomes, 690 A.2d 310, 316 (R.I. 1997) (recognizing that prior bad-acts evidence tends to be "considered so prejudicial that it is per se inadmissible regardless of any relevancy it might have" to demonstrate the accused's propensity to commit the alleged crime).

131. See Imwinkelried, *supra*, note 127, at 1008 (noting that the prosecution usually cites to the common-plan exception when attempting to persuade a court to admit uncharged prior sexual-misconduct evidence, since appellate reversals for improper application of the common-plan exception are minimal); see also 2 David W. Louisell & Christopher B. Mueller, Federal Evidence § 140, at 258-62 (1985) (noting that the plan exception is often broadly construed in prosecutions of sex crimes).

132. Fingar, *supra* note 60, at 517; see also Edward J. Imwinkelried, *supra* note 107, § 3:12 (noting that courts tend to apply the Rule 404(b) exception of plan with varying degrees of difficulty).

133. "[T]he [true-plan] theory protects the accused from purely opportunistic actions, which [are] inadmissible as plan evidence." Mar, *supra* note 21, at 858 n.86. The spurious-plan theory completely "fails to recognize the issue of purely opportunistic behavior." *Id.* (defining opportunistic behavior as "any spontaneous action committed by the accused when a window of opportunity suddenly becomes

mit prior bad-acts evidence in one of two ways. First, courts may admit prior bad-acts evidence if the prosecution can prove that the defendant's charged and uncharged bad acts are part of one grand plan.¹³⁴ Based on this definition, courts may appropriately admit prior bad-acts evidence if each bad act is a stage or a step in the defendant's "all-encompassing scheme" to commit the charged crime.¹³⁵ Second, courts may admit prior bad-acts evidence under the true-plan theory if the prosecution successfully demonstrates that the defendant meticulously orchestrated the manner in which he committed each of his bad acts.¹³⁶ A crime is meticulously

available") "Conduct is 'purely opportune' only if it is spur of the moment conduct, intended to take advantage of a sudden opportunity." *Id.* (citing *United States v. Ivery*, 999 F.2d 1043, 1046 n.5 (6th Cir. 1993)). "Such conduct, if purely spur of the moment, cannot be deemed part of a plan. Even under the unlinked acts theory of *Ewoldt*, a 'plan does not encompass unrelated crimes committed against random targets of opportunity.'" *Id.* (quoting *Mendez & Imwinkelried*, *supra* note 20, at 491-92).

134. *People v. Tassel* 679 P.2d 1, 5 (Cal. 1994) (reasoning that there must be a "single conception of plot" of which the charged and uncharged crimes are individual manifestations," and that "[a]bsent such a 'grand design,' talk of a 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility-the defendant's disposition"); 1A John Henry Wigmore, *Wigmore on Evidence* § 217, at 1883 (1983); *see also* *Bryden & Park*, *supra* note 58, at 546 (noting that the plan exception can apply to instances where the prior bad-act is "a means by which the defendant prepares for the commission of another crime, as in Wigmore's example of stealing a key in order to rob a safe"); *Imwinkelried*, *supra* note 127, at 1014 (recognizing that the true-plan theory permits the admission of prior bad-acts evidence when the charged and uncharged bad acts form one greater goal); *Mar*, *supra* note 21, at 850 (noting that prior bad-acts evidence may be admitted under the plan theory if the charged and uncharged bad acts are part of an "overall design or grand scheme").

135. *See id.*; *see also* *Imwinkelried*, *supra* note 127, at 1014 (noting *Tassel*, 679 P.2d at 5 n.4 (recognizing that the plan exception permits the admission of prior bad-acts evidence when the prior bad act and the charged crime are part of some "grand design")); 22 Charles A. Wright & Kenneth Graham, Jr., *Federal Practice and Procedure: Evidence* § 5244, at 500 (1978) (noting that trial judges may admit prior bad-acts evidence when the defendant allegedly committed the charged and uncharged bad acts in order to achieve one greater objective).

136. *See State v. Nardolillo*, 698 A.2d 195, 197-201 (R.I. 1997). In *Nardolillo*, the defendant was charged with robbing nineteen houses within two and one half months. The defendant was acquitted on thirteen charges since the victims refused to testify. During each robbery, the defendant's girlfriend drove him around the neighborhood looking for vacant homes. The defendant repeatedly stole electronic equipment which he immediately exchanged with his supplier for drugs. The court allowed the prosecution to inform the jury about the thirteen other charges according to the plan exception. The court reasoned that the trial judge properly admitted the evidence about the thirteen acquittals since the defendant repeatedly used the same planned technique and since each house robbery enabled

orchestrated if the defendant used the exact same technique to commit each crime, such as always wearing a Mickey Mouse mask when robbing banks. Consequently, if the prosecution can show that the defendant consciously chose to employ the same technique and methodology to commit each bad act, then the prior bad-acts evidence is admissible.¹³⁷

2. *Spurious-Plan Theory*

The spurious-plan theory,¹³⁸ by contrast, is the broad comprehensive interpretation of the plan exception. According to this theory, the prior bad acts and the alleged crime need not be related.¹³⁹ Rather, the minimum requisite for admitting prior bad-acts evidence under the spurious-plan theory is that the alleged bad acts are *similar* to the charged crime.¹⁴⁰ For example, under the spurious-plan theory in a prosecution for selling drugs, the trial judge may admit evidence of the defendant's past convictions for selling drugs in order to prove the defendant's plan to sell drugs. During prosecutions for drug-related misconduct,¹⁴¹ burglary¹⁴² and sex

him to achieve his greater goal of supporting his daily cocaine habit of \$250. *See id.*; *State v. Sepe*, 410 A.2d 127, 130 (R.I. 1980) (holding that evidence is admissible under the "common-plan" exception when "two or more crimes [are] so related to each other that proof of one tends to establish the other"); *see also Imwinkelried*, *supra* note 127, at 1013 (noting that for the true-plan theory to permit the admission of prior bad-acts evidence, "there must be 'such concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations'"); *Mar*, *supra* note 21, at 850 (acknowledging that trial judges may use the plan exception to admit prior bad-acts evidence when there is evidence that the defendant "used the same technique and that he employed the same methodology by a conscious choice").

137. *See Mar*, *supra* note 21, at 850.

138. This use of the plan theory is also referred to as "unlinked plan." *See Bryden & Park*, *supra* note 21, at 178; *Imwinkelried*, *supra* note 127, at 1011.

139. *See Imwinkelried*, *supra* note 127, at 1009.

140. *See id.* at 1012.

141. *See generally Wright & Graham, Jr.*, *supra* note 135, § 5244, at 500 n.9 (mentioning drug-related misconduct in discussion of the plan exception).

142. *See, e.g., People v. Moen*, 526 P.2d 654, 655-56 (Colo. 1974) (noting that the prior burglary of an apartment committed by the defendant was similar to the charged burglary so that the trial judge properly admitted the prior bad-acts evidence under the plan exception); *Perry v. People*, 181 P.2d 439, 441-42 (Colo. 1947) (holding that the trial judge properly admitted evidence that the defendant previously committed a burglary in the present trial for burglary under the plan exception).

offenses,¹⁴³ the State often argues the spurious-plan theory as a means of convincing trial judges to admit prior bad-acts evidence. Prosecutors advocate the use of the spurious-plan theory because it enables courts to admit prior bad-acts evidence to illustrate that on separate occasions, the defendant used somewhat similar methods to perpetrate a number of parallel but unrelated bad acts.¹⁴⁴ Specifically, a court, when admitting evidence under the spurious-plan theory, simply requires the prosecution to show that the accused previously committed a bad act similar to the crime charged.¹⁴⁵ Therefore, if a defendant repeatedly commits the same type of crime, then this expansive interpretation of plan essentially enables courts always to permit prior bad-acts evidence.¹⁴⁶

In contrast to the spurious-plan theory, advocates for the true-plan theory argue that the spurious-plan theory is nothing more than a guise under which courts may admit unadulterated propensity evidence.¹⁴⁷ Furthermore, true-plan advocates argue that, since many courts continue to expand the plan exception irresponsibly, the exception is degenerating into a "dumping ground" for inadmissible bad character evidence.¹⁴⁸ In essence, the argument follows, courts adopting the spurious-plan theory are converting the plan exception into a "plan-to-commit-a-series-of-similar-

143. See Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. Rev. 261, 278-80 (1977). See, e.g., *People v. Partin*, 509 N.E.2d 662, 665 (Ill. App. Ct. 1987) *appeal denied*, 515 N.E.2d 121 (Ill. 1987) (holding that the trial judge properly admitted evidence of prior sexual misconduct during the defendant's trial for pornography and sexual molestation).

144. See Bryden & Park, *supra* note 21, at 178; see also, e.g., *Commonwealth v. Schoening*, 396 N.E.2d 1004 (Mass. 1979) (holding that evidence of the defendant's receiving kickbacks on two previous occasions was admissible to show plan or motive even though the kickbacks were all from different parties). "[T]he defendant's use of his position to guarantee contracts to particular firms and thus to guarantee kickbacks to himself provided the common or general scheme underlying all three transactions." *Id.*

145. See Imwinkelried, *supra* note 127, at 1011-12 (citing *United States v. Wright*, 943 F.2d 748, 751 (7th Cir. 1991)); see also *State v. Hines*, 354 N.W.2d 91, 93 (Minn. Ct. App. 1984) (holding that the court properly admitted evidence of prior burglaries committed by the defendant during the defendant's present trial for burglary).

146. See Fingar, *supra* note 60, at 517.

147. *Id.* at 517-18 (citing Imwinkelried, *supra* note 107, at §§ 3:21 to :23).

148. Mendez & Imwinkelried, *supra* note 20, at 478-79 (citing *Wright & Graham, Jr.*, *supra* note 135, § 5244, at 499).

crimes theory."¹⁴⁹ The Rhode Island Supreme Court inappropriately applied the spurious-plan theory in *Hopkins*. This Note argues that, even under the proper true-plan theory, the prior sexual-misconduct evidence offered against the defendant was inadmissible propensity evidence.

3. *Federal Rules of Evidence 413, 414 and 415*

Congress's recent adoption of three new federal evidentiary rules sheds light on the debate between the true-plan theory and the spurious-plan theory.¹⁵⁰ Until recently, in theory, the Federal Rules of Evidence maintained the ban on irrelevant character evidence. However, on September 13, 1994, in response to public outrage towards sexual assault¹⁵¹ and child molestation,¹⁵² Congress enacted Federal Rules of Evidence 413,¹⁵³ 414¹⁵⁴ and 415¹⁵⁵ as

149. Imwinkelried, *supra* note 107, at § 3:23.

150. Fed. R. Evid. 413, 414, 415.

151. There was enormous public outcry against the exclusion of prior misconduct evidence after William Kennedy Smith was acquitted of raping a woman he met in a Palm Beach, Florida bar. See Danna, *supra* note 59, at 278. Smith admitted to having sex with the women but he claimed it was consensual. See Bryden & Park, *supra* note 21, at 171. The trial judge excluded the testimony of three other women who alleged that the defendant sexually assaulted them, and as a result, Smith was acquitted. See *id.* at 171-72.

152. See *supra* note 1 (detailing public disdain for child molestation).

153. Fed. R. Evid. 413. The full text of the rule follows:

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

part of the Violent Crime Control and Law Enforcement Act of 1994.¹⁵⁶ These three rules permit trial judges to admit all prior sexual-misconduct evidence during the prosecution of a sex crime.¹⁵⁷ Proponents of the bill asserted that Congress needed to enact new evidentiary rules for the purpose of broadening and clarifying the Rule 404(b) plan exception.¹⁵⁸ These new rules provide a specific exception to the character-evidence ban, and thus enable prosecutors to present prior uncharged bad-acts evidence in sexual assault and child-molestation prosecutions.¹⁵⁹

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- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Id.

154. Federal Rule of Evidence 414 is more or less identical to Rule 413 with the following differences: (1) in paragraph (a) the words "child molestation" are substituted for "sexual assault;" (2) paragraph (d) defines a "child" as "a person below the age of fourteen;" (3) paragraphs (d)(1)-(4) substitute the words "child" for "another person" and remove references to consent. *Compare* Fed. R. Evid. 414 with Fed. R. Evid. 413.

155. Federal Rule of Evidence 415 provides in part:

Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.

- (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

Fed. R. Evid. 415.

156. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. §§ 13701-14223 (1994)). These rules were not created by the traditional rule-making process. Specifically, there was no advisory committee proposal, public comment period or Supreme Court adoption. *See* 28 U.S.C. § 2072 (1994).

157. *See* Fed. R. Evid. 413, 414, 415.

158. Danna, *supra* note 59, at 290-91 (citing Anne Elsberry Kyl, Note, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 Ariz. L. Rev. 659, 661, 675 n.16 (1995)) ("According to [Senator Kyl], the goal was to create a broader or clearer statement [of] the 'design or plan' exception in Rule 404(b), which the Congress believed was only seldom and narrowly applied."); *see also* 140 Cong. Rec. H2415-04, at H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari).

159. *See* Danna, *supra* note 59, at 291. Proponents for the new rules argued that they were necessary in order to secure more convictions of sexual offenders. Jason L. Mccandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 Wm. & Mary Bill Rts. J. 689 (1997). Vocal advocate and Congresswoman Susan Molinari (R-N.Y.) argued that the rules were necessary to prevent serial rapists and child molesters from going free. 140 Cong. Rec. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari).

Congress's recent decision to adopt these three new expansive rules of evidence¹⁶⁰ illustrates its intention to have courts construe Rule 404(b)'s other-purposes exceptions narrowly. If Congress intended courts to interpret Rule 404(b)'s exceptions broadly, then the three all-encompassing amendments would be superfluous. Therefore, it is likely that the true-plan theory, which calls for a narrow interpretation of the plan exception, is the intended device for interpreting the plan exception. Although Congress, by Rules 413, 414 and 415, rendered the "plan" limit inoperative with respect to sexual assault and child-molestation prosecutions, the enactment of these three new rules of evidence suggest that Congress originally intended for trial judges to construe the other-purposes exceptions within Rule 404(b) narrowly.

III. *STATE V. HOPKINS*

A. *Factual and Procedural History*

In *State v. Hopkins*,¹⁶¹ the Rhode Island Supreme Court re-evaluated the question of the admissibility of prior sexual-misconduct evidence in a child-molestation prosecution. The trial court found the defendant, Charles Hopkins, guilty of five of seven counts of sexual molestation against his stepson, Mark.¹⁶² Hopkins is currently serving thirty years on counts one, three and six, and twenty years for counts two and four.¹⁶³ The court suspended twenty-five years of his total sentence.¹⁶⁴

Mark, seventeen at the time of trial,¹⁶⁵ alleged that his stepfather molested him between the ages of nine and thirteen while they were living in the same house.¹⁶⁶ Mark claimed that when he was about nine-years old, his stepfather made him touch his stepfather's penis.¹⁶⁷ The sexual touching then progressed to oral sex.¹⁶⁸ Mark further testified that his stepfather attempted unsuc-

160. See Fed. R. Evid. 413, 414, 415.

161. 698 A.2d at 183.

162. See Brief for Appellee at 1, *State v. Hopkins*, 698 A.2d 183 (R.I. 1997) (No. 96-212-C.A.).

163. See *id.*

164. See *id.*

165. See *id.* at 2.

166. See *id.*

167. See *id.* at 2.

168. See *id.*

cessfully to force him to have anal sex.¹⁶⁹ All of these alleged assaults occurred at the defendant's home over the course of approximately four years.¹⁷⁰

B. *The Prosecution's Evidence of Prior Uncharged Bad Acts*

Over the objection of the defendant, the trial judge permitted the State to introduce uncharged prior bad-acts testimony from two witnesses, each of whom alleged that the defendant assaulted him many years earlier.¹⁷¹ The court permitted James Snoke to testify that the defendant allegedly sexually assaulted him approximately seventeen years earlier while he worked at the defendant's gas station.¹⁷² Moreover, the jury heard Charles Hopkins, Jr. testify that the defendant abused him approximately fifteen years prior to the trial.¹⁷³

1. *Testimony of James Snoke*

At trial, James Snoke claimed that while he was working at the defendant's gas station, the defendant sexually assaulted him approximately four times.¹⁷⁴ These assaults allegedly occurred in 1977 when Snoke was thirteen.¹⁷⁵ Snoke testified that the defendant molested him on multiple occasions at the gas station, at the defendant's home and on a camping trip.¹⁷⁶ He claimed that the defendant threatened to accuse him of stealing from the gas sta-

169. *See id.* at 3.

170. *See id.*

171. *See Hopkins*, 698 A.2d at 186.

172. *See* Brief for Appellant at 11, *Hopkins* (No. 96-212-C.A.).

173. *See id.* at 17. The defendant's biological son was twenty-five years old at the time of trial. He testified that, although he could not remember the first time he was molested, he thought the abuse began when he was seven or eight. *See id.* at 5.

174. *See id.* At trial, Snoke, a recovering heroine and cocaine addict, admitted to "seven prior criminal convictions . . . which included larceny, violation of the banking laws, forgery, breaking and entering with intent [to] commit larceny, possession of cocaine, possession of a pistol without a license, discharging a pistol in a compact area, and harboring a fugitive." *See id.* at 6.

175. *See id.* at 5. Because Snoke waited fifteen years to report the alleged abuse, the statute of limitations expired, thus making it impossible for the state to add the witness's claim to the charges against the defendant. *See id.* at 6.

176. *See* Brief for Appellee at 6, *Hopkins* (No. 96-212-C.A.).

tion if he told anyone about the abuse.¹⁷⁷ The alleged encounters involved sexual touching and oral sex.¹⁷⁸

2. *Testimony of Charles Hopkins, Jr.*

Charles Hopkins, Jr., the defendant's twenty-six-year old biological son, was the second State witness regarding the defendant's prior uncharged sexual misconduct. Charles Hopkins, Jr. is nine years older than his stepbrother Mark.¹⁷⁹ At trial, Hopkins, Jr. testified that his father began molesting him while his parents were still married and sharing a home.¹⁸⁰ Hopkins, Jr. thought that the abuse began when he was approximately seven- or eight-years old and stopped when he was about twelve-years old.¹⁸¹ Hopkins, Jr. also alleged that he thought the abuse involved anal sex, oral sex and touching.¹⁸² He was unable to remember specifically when or where the alleged incidents occurred.¹⁸³

C. *Majority Opinion*

On appeal to the supreme court, Hopkins argued that, despite the trial judge's attempt to rectify the unfair prejudice of the prior uncharged bad-acts evidence through limiting jury instructions,¹⁸⁴ the evidence was so prejudicial that no curative instruction could have alleviated or even palliated its effect.¹⁸⁵ Therefore, Hopkins

177. *See id.*

178. *See id.*

179. *See* Brief for Appellant at 5, *Hopkins* (No. 96-212-C.A.).

180. *See* Brief for Appellee at 18, *Hopkins* (No. 96-212-C.A.).

181. *See* Brief for Appellant at 5-6, *Hopkins* (No. 96-212-C.A.).

182. *See* Brief for Appellee at 7, *Hopkins* (No. 96-212-C.A.).

183. *See* Brief for Appellant at 5-6, *Hopkins* (No. 96-212-C.A.). Charles Hopkins Jr. could not clearly remember where the alleged abuse took place. He testified that the abuse occurred "probably in the home" and "probably in the parlor." In addition, he could not remember how often he was allegedly abused by his father. He testified that it probably occurred more than once a month and "maybe, sometimes" more than once per week. *See id.*

184. *See Hopkins*, 698 A.2d at 187.

185. *See State v. Quattrocchi*, 681 A.2d 879, 887 (R.I. 1996). At trial, before Snoke and Hopkins, Jr. testified, the trial judge gave the following jury instructions:

What [the witness] may say may refer to certain activity that took place allegedly between Mr. Hopkins and [the witness]. This evidence may be used by you for your consideration on the issue of motive, opportunity, intent or plan, but you cannot use this evidence as proof that the defendant is a bad person and therefore probably did commit the offenses that the State alleges were committed against [Mark] Hopkins.

petitioned the supreme court to reverse his conviction.¹⁸⁶ In a three-to-one decision,¹⁸⁷ the Rhode Island Supreme Court held that the trial court's decision to admit evidence of uncharged acts of sexual misconduct did not constitute reversible error.¹⁸⁸ The court held that the trial judge properly admitted the prior bad-acts evidence to demonstrate both the defendant's lewd disposition towards young boys and the defendant's plan to molest young boys under his authority.¹⁸⁹

The *Hopkins* court addressed the issue of whether the prior bad-acts evidence admitted served any purpose other than proving the defendant's propensity to commit like crimes.¹⁹⁰ Specifically, the court held that, if the prosecution proffered the testimony of Snoke and Hopkins, Jr. for any relevant other purpose besides establishing the defendant's bad character, then the trial judge correctly admitted the prior bad-acts evidence.¹⁹¹

First, the court held that the trial judge properly admitted the uncharged prior bad-acts evidence under the other purpose of plan.¹⁹² The majority reasoned that a common plan existed because all three incidents involved generally similar acts and victims of about the same age, and some of the prior uncharged acts allegedly occurred in the home.¹⁹³ The court also held that these generalizations established a *modus operandi*.¹⁹⁴ Second, the ma-

Brief for Appellant at 15 n.1, *Hopkins* (No. 96-212-C.A.).

186. See *Hopkins*, 698 A.2d at 184-85.

187. Justice Flanders wrote the majority opinion and Justice Lederberg and Justice Bourcier concurred. Chief Justice Weisberger dissented.

188. See *Hopkins*, 698 A.2d at 184-85.

189. See *id.* The court held that the trial court properly admitted the prior bad-acts evidence:

[t]o show that Hopkins's sexual molestation of his stepson was part of a common scheme or plan of sexual misconduct that Hopkins carried out against boys of a similar age at a time when they too, like the stepson, were under Hopkins's thumb . . . [T]his 404(b) evidence was relevant to show that when given the opportunity, Hopkins had a motive, an intent, and a plan to abuse children of like age in a like manner to that in which he abused his stepson when they were under his control or influence.

Id.

190. *Id.* at 184-87.

191. See *id.* at 185.

192. See *id.* at 185.

193. See *id.* at 185 n.2.

194. See *id.* at 186. But see *State v. Lamoureux*, 623 A.2d 9, 13 (R.I. 1993) (noting that "[g]enerally *modus operandi* is used to identify a defendant but may also be used when the issue of consent is raised") (citing *Youngblood v. Sullivan*,

jority reasoned that since a conviction hinged on the credibility of the complaining witness, the prosecution "reasonably needed" the prior bad-acts testimony to prove its case.¹⁹⁵ Finally, the court held that the trial court properly admitted the prior uncharged misconduct evidence to prove that the defendant was driven by his lewd disposition for young boys under his control and influence.¹⁹⁶ For these reasons, the court affirmed the admittance of the prior bad-acts evidence.

D. *Dissenting Opinion*

In a dissenting opinion, Chief Justice Weisberger concluded that the evidence presented by Snoke and Hopkins, Jr. did not qualify for any Rule 404(b) exception nor for any common-law exception.¹⁹⁷ Chief Justice Weisberger presented two arguments to support his opinion that the majority expanded the other-purposes exception beyond the confines the court had previously established.¹⁹⁸ In order to come to these conclusions, he noted that the court previously held that trial judges may admit prior bad-acts evidence either (1) under the traditional exceptions of Rule 404(b) or (2) in a limited number of instances to prove the defendant's lewd disposition.¹⁹⁹ The dissent first argued that the majority erroneously affirmed the trial judge's decision to admit the prior uncharged bad-acts evidence under the traditional Rule 404(b) other purpose of plan.²⁰⁰ The dissent reasoned that the prior bad-acts evidence could not fall under the plan exception because the past crimes were too attenuated to demonstrate any grand scheme or design.²⁰¹ Specifically, these past acts occurred years apart and in an entirely different context than the present crime.²⁰²

Second, the dissent argued that the majority impermissibly affirmed the trial judge's decision to admit the prior bad-acts evi-

628 P.2d 400, 402 (Or. 1981)). In *Hopkins*, neither identity nor consent were issues; therefore modus operandi was inappropriately applied. *Hopkins*, 698 A.2d at 185.

195. *Id.* at 187.

196. *See id.* at 186-87.

197. *See id.* at 190 (Weisberger, C.J., dissenting).

198. *See id.*

199. *See id.* at 189-90.

200. *See id.* at 190.

201. *See id.*

202. *See id.* at 191.

dence under the lewd-disposition exception since the evidence does not fall within the confines of the *Jalette* and *Pignolet* tests.²⁰³ Specifically, the dissent argued that the trial judge improperly admitted the prior bad-acts evidence under the lewd-disposition exception because neither witness lived in the same house as the complaining witness, and neither alleged assault occurred during the same time period.²⁰⁴ Therefore, according to the dissent, since the prior bad-acts evidence did not qualify for the traditional Rule 404(b) plan exception nor the common-law lewd-disposition exception, the evidence is nothing more than impermissible propensity evidence.²⁰⁵ The next section of this Note details the majority's errors in *Hopkins* and, through highlighting the dissent's argument, proposes a proper application of Rule 404(b).

IV. THE RHODE ISLAND SUPREME COURT'S MISAPPLICATION OF THE LEWD-DISPOSITION AND PLAN EXCEPTIONS IN *STATE V. HOPKINS*

A. *The Present State of the Lewd-Disposition Exception in Rhode Island*

After *Quattrocchi*, defense attorneys could sleep peacefully since the Rhode Island Supreme Court appeared to be taking a firm stance against any additional expansions of the lewd-disposition exception. However, after *Hopkins*, the restless nights returned. In *Hopkins*, the Rhode Island Supreme Court misapplied the lewd-disposition exception, thereby transforming the exception into an ambiguous wildcard.

Prior to *Hopkins*, case law suggested that, when considering the admission of prior bad-acts evidence in sexual-molestation prosecutions, courts need first to consider whether the prior sexual misconduct is "not too remote" from the crime charged.²⁰⁶ Previously, the court deemed prior sexual-misconduct evidence "not too remote" if any one of the following three conditions existed: (1) the

203. See *id.* at 190.

204. See *id.*

205. See *id.* Chief Justice Weisberger further stated that the evidence was only offered to show propensity, and thus, was inadmissible since "[the court has] steadfastly maintained that other acts of sexual molestation against third parties are inadmissible for the sole purpose of showing propensity." *Id.*

206. See *State v. Cardoza*, 465 A.2d 200, 203 (R.I. 1983); *State v. Pignolet*, 465 A.2d 176, 181 (R.I. 1983); *State v. Jalette*, 382 A.2d 526, 533 (R.I. 1978).

defendant purportedly committed the alleged uncharged bad acts against the complaining witness and a third party testified about the abuse;²⁰⁷ (2) the defendant purportedly committed the alleged uncharged bad acts against the complaining witness and the complaining witness testified about the abuse²⁰⁸ or (3) the defendant committed the alleged uncharged bad acts against a third party and the third party testified about the abuse.²⁰⁹ Courts may only apply this third option, viz. alleged uncharged bad acts against a *third* party, if the defendant allegedly committed the prior bad acts against victims who live in the same home as the complaining witness,²¹⁰ and the bad acts evidence occurs during a similar time period with a child of approximately the same age, who is related to the complaining witness and who alleges similar sexual assaults.²¹¹ Thereafter, only if the prior bad-acts evidence survives this threshold issue of remoteness, the court may then address the second prong of whether the evidence is reasonably necessary to prove the charges levied against the accused.²¹²

1. *The Admissibility of the Testimony of James Snokes*

The *Hopkins* court ignored the first part of this two-prong test devised by the supreme court to determine whether the prior bad-acts evidence was admissible. Specifically, the court disregarded the threshold question of whether the prior sexual misconduct evidence was "not too remote" from the charged crime. Instead, the court began its analysis with the second prong of the test by asserting that the prior bad-acts evidence was reasonably necessary to

207. See *supra* note 204.

208. See *Cardoza*, 465 A.2d at 203 (holding that the lewd-disposition exception extended to cover testimony by the complaining witness regarding uncharged bad acts committed by the defendant against oneself since it is admissible to prove the defendant's lewd disposition towards the complaining witness).

209. See *Pignolet*, 465 A.2d at 181 (holding that a "not too remote sex crime" meant "closely related in time, place, age, family relationships of the victims and the form of sexual acts"); see also *Jalette*, 382 A.2d at 533 (holding that after establishing the threshold requirement of potential admissibility, the court must subject the proffered evidence to the three articulated restrictions to determine whether admitting the evidence will unfairly prejudice the defendant).

210. See *State v. Quattrocchi*, 681 A.2d 879, 886 (R.I. 1996); *State v. Gomes*, 690 A.2d 310, 317 (R.I. 1997).

211. *Pignolet*, 465 A.2d at 181.

212. *Gomes*, 690 A.2d at 316 (noting that cumulative evidence is inadmissible); see also *Jalette*, 627 A.2d at 533 (recognizing that courts should admit prior bad-acts evidence sparingly).

show why the complaining witness belatedly reported the alleged abuse and to rebut the defendant's claim that the complaining witness fabricated his allegations of sexual abuse.²¹³ Had it actually considered the remoteness threshold question, the supreme court could not have reasonably affirmed the trial judge's decision to admit Snoke's prior bad-acts evidence under the lewd-disposition exception.²¹⁴ Specifically, Snoke's testimony fails at least four of the six requisite elements necessary to establish that an alleged crime is "not too remote." First, according to *Quattrocchi*, the witness who is alleging the prior bad acts must have a familial relationship with the complaining witness and live in the same home as the complaining witness during the time of the alleged assaults.²¹⁵ The *Hopkins* facts are even more demonstrative against admitting the prior bad-acts evidence than the facts in *Quattrocchi*.²¹⁶ In *Quattrocchi*, one of the prior bad-acts evidence witnesses was the godchild of the defendant.²¹⁷ However, in this case, no such familial relationship existed.²¹⁸ Therefore, in *Hopkins*, Snoke's testimony is inadmissible—it concerns a remote crime against an alleged victim unrelated to the complaining witness who did not live in the same house as the complaining witness.²¹⁹ Additionally, Snoke's testimony fails the remoteness test because he and

213. *Hopkins*, 698 A.2d at 185-87. The *Hopkins* court held that "the trial justice was entitled to conclude that the uncharged acts of sexual misconduct that were offered via Snoke and Hopkins, Jr., were 'reasonably necessary' to prove the prosecution's case, which largely turned on a credibility battle between Hopkins and his stepson." *Id.* at 187.

214. *See, e.g., Gomes*, 690 A.2d at 317 (noting that prior bad acts are too remote when the person alleging the prior bad act lives outside the home of the complaining witness and the defendant).

215. *See Quattrocchi*, 681 A.2d at 886; *Gomes*, 690 A.2d at 316. In *Quattrocchi*, the court noted that *Pignolet* expanded the lewd-disposition exception insofar as the bad acts evidence pertained to related witnesses living in the same home. *Quattrocchi*, 681 A.2d at 886. The court further held that:

Pignolet represented the extreme beyond which we are unwilling to extend the other-crimes . . . exception because of its overwhelming prejudice to the defendant and its tendency to be viewed by the trier of fact as evidence that the defendant is a bad man . . . and, therefore, probably committed the offense with which he is charged.

Id.

216. *See* Brief for Appellant at 12, *Hopkins* (No. 96-212-C.A.).

217. *See Quattrocchi*, 681 A.2d at 885.

218. *See* Brief for Appellant at 5, *Hopkins* (No. 96-212-C.A.) (noting that Snoke worked at the defendant's gas station approximately ten years before the alleged abuse against the defendant's stepson).

219. *See Hopkins*, 698 A.2d at 189.

the complaining witness did not allege similar sexual assaults, and the alleged assaults occurred approximately ten years apart.²²⁰ Therefore, Snoke's testimony fails the threshold remoteness issue since he shares no familial relationship with the complaining witness, they do not live in the same home, they did not allege similar acts and the alleged assaults are separated by an extensive length of time. For these reasons, the trial judge inappropriately admitted Snoke's testimony into evidence under the lewd-disposition exception.

2. *The Admissibility of the Testimony of Charles Hopkins, Jr.*

The *Hopkins* court also improperly affirmed the trial judge's decision to admit the testimony of Hopkins, Jr. under the lewd-disposition exception.²²¹ Here again, the prior bad-acts evidence is inadmissible because the evidence fails the threshold remoteness prong. *Pignolet* and *Quattrocchi* established that third-party prior bad-acts testimony is only admissible, and thereby "not too remote," if six criterion are met.²²² The witness and the complaining witness must be: (1) related, (2) approximately the same age and (3) living in the same household at the time of the assaults.²²³ In addition, the prior bad acts must be closely related in: (1) time, (2) nature and (3) place of assault.²²⁴ In *Hopkins*, Hopkins, Jr.'s testimony is inadmissible because it fails at least three of the six required elements of "not too remote" crimes. First, Hopkins, Jr. did not live in the same home as the defendant and the complaining witness during the time of the alleged assaults.²²⁵ Second, the alleged assaults did not occur during the same time period since they

220. See *id.* at 186.

221. See *id.* at 189-91 (Weisberger, C.J., dissenting); see also *State v. Gomes*, 690 A.2d 310, 317 (R.I. 1997) (recognizing that the court refused to expand the lewd-disposition exception to admit prior bad-acts testimony from alleged victims who live outside the complaining witness's home); *Quattrocchi*, 681 A.2d at 886 (noting that the court is not going to expand the lewd-disposition exception beyond the confines of *Pignolet*).

222. *Pignolet*, 465 A.2d at 181; see also *Quattrocchi*, 681 A.2d at 886 (holding that courts cannot expand the lewd-disposition exception beyond the confines of the holding in *Pignolet*).

223. See *Pignolet*, 465 A.2d at 181.

224. See *Quattrocchi*, 681 A.2d at 886; *Pignolet*, 465 A.2d at 181.

225. See *Hopkins*, 698 A.2d at 189-90 (Weisberger, C.J., dissenting) (noting that the two half-brothers only lived together up to the complaining witness's third birthday and no sexual assaults allegedly occurred during that time).

were separated by approximately ten years.²²⁶ Additionally, the defendant allegedly assaulted Hopkins, Jr. and the complaining witness under entirely different circumstances.²²⁷ Specifically, Hopkins, Jr. alleged that the defendant sexually assaulted him while his parents were still married, while Mark alleged that the defendant assaulted him after the defendant divorced his mother and moved out of the family home.²²⁸ Third, the prosecution could not demonstrate any similarities regarding the style and/or technique of the sexual abuse due to Hopkins, Jr.'s deteriorated memory.²²⁹ Therefore, since the prosecution could not prove that Hopkins, Jr.'s allegations regarded a "not too remote" crime because they did not live in the same house, the assaults did not occur during the same time period and there were no similarities in the technique of the abuse, the trial court inappropriately admitted the evidence.

Despite the holding in *Quattrocchi*, which recognized the need to limit the scope of the *Pignolet* test, the *Hopkins* court proceeded to expand the lewd-disposition exception. As a result of *Hopkins*, living in the same home as the complaining witness is no longer a pre-requisite for the admission of third-party prior bad-acts evidence. After the expansive holding in *Hopkins*, the court is less likely to overturn trial judges for admitting third-party prior bad-acts evidence even though the alleged sexual assaults did not occur within the same time frame and in the same manner.²³⁰ This new expansive interpretation of the lewd-disposition exception essentially nullifies the protections conferred by Rule 404(b).²³¹

B. *The Application of the Plan Exception in Hopkins*

1. *The Misuse of the Spurious-Plan Theory*

In addition to affirming the trial judge's admission of the prior bad-acts evidence to show the defendant's lewd disposition towards young boys,²³² the *Hopkins* court held that the trial judge properly admitted the evidence under the rubric of the traditional 404(b)

226. See *id.* at 186.

227. See Brief for Appellant at 19, *Hopkins* (No. 96-212-C.A.).

228. See *id.*

229. See *id.* at 19-20.

230. *Hopkins*, 698 A.2d at 190 (Weisberger, C.J., dissenting).

231. See *id.* at 191.

232. See *id.* at 184-86.

other purpose of plan.²³³ Despite the court's holding, closer scrutiny of the allegations of uncharged misconduct offered by the prosecution makes clear that the testimony cannot be admitted under the plan exception.²³⁴

In an attempt to shoehorn the prior bad-acts evidence into the Rule 404(b) plan exception, the *Hopkins* court interpreted the plan exception according to the spurious-plan theory rather than the true-plan theory. Moreover, the court held that the trial judge properly admitted the prior sexual-misconduct evidence under the plan exception because the evidence demonstrated that the defendant previously committed similar crimes, thus establishing the defendant's plan to molest young boys.²³⁵

According to the spurious-plan theory, prior bad-acts evidence is admissible if the alleged bad acts are similar to the charged crime.²³⁶ This reasoning supporting the spurious-plan theory is inappropriate for several reasons. First, Congress's recent decision to adopt three new, expansive rules of evidence²³⁷ demonstrates its intent that courts construe the Rule 404(b) other-purposes exceptions narrowly. If courts could interpret plan according to the spurious-plan theory, then trial judges may already admit virtually all prior sexual-misconduct evidence under Rule 404(b). Despite the existence of Rule 404(b), Congress decided to enact Federal Rules of Evidence 413, 414 and 415. These new rules enable trial judges to always admit evidence of the accused's commission of any other sexual assaults when the defendant is being tried for an offense of sexual assault or child molestation.²³⁸ Therefore, had Congress recognized the spurious-plan theory as a legitimate theory, its three new rules of evidence would be superfluous.²³⁹ These rules are not superfluous, as Congress's original intent was for trial judges to construe the other-purposes exceptions narrowly, pursuant to the true-plan theory.

Second, if courts apply the plan exception liberally, the exception becomes nothing more than a mechanism enabling juries to

233. *Id.* at 185.

234. *See id.* at 190-91.

235. *See Bryden & Park, supra* note 21, at 178.

236. *Imwinkelried, supra* note 127, at 1012.

237. Fed. R. Evid. 413, 414, 415.

238. *See id.*

239. *See supra* Part II.B.3.

hear extremely prejudicial propensity evidence.²⁴⁰ Such a broad interpretation of the plan exception enables trial judges to admit any evidence of the commission of similar crimes under the rubric of a plan to always commit a certain type of crime. Such an interpretation defeats Congress's reasons for enacting Rule 404(b) since jurors will inevitably convict defendants for being a bad person and not necessarily for committing the charged crime. The result of this expansive interpretation of Rule 404(b) is that the exceptions will swallow the rule. For these reasons, the *Hopkins* court incorrectly applied the spurious-plan exception, thereby admitting inadmissible evidence.

B. *The Application of the True-Plan Theory*

Even if the *Hopkins* court had applied the true-plan theory instead of the spurious-plan theory, then admission of the prior bad-acts evidence still would have been impermissible. According to the true-plan theory, prior bad-acts evidence is admissible if the prosecution can prove that the defendant's charged and uncharged bad acts are part of some "illustrious scheme"²⁴¹ or if the prosecution can demonstrate that the defendant meticulously planned out the manner in which he committed each of his bad acts.²⁴²

First, in *Hopkins*, the prior uncharged bad acts are inadmissible under the true-plan theory since the defendant did not commit the charged and uncharged bad acts in order to realize any grand scheme.²⁴³ The prosecution argued that the defendant had a grand scheme to molest young boys under his control. However, this argument is unpersuasive.²⁴⁴ Common sense dictates it unlikely that the defendant consciously planned to molest Snoke, Hopkins, Jr. and the complaining witness in order to achieve his greater goal of molesting all young boys under his control.²⁴⁵ This type of analysis seems particularly illogical considering the fact that the defendant supposedly waited over ten years between assaults.²⁴⁶ Additionally, neither of the alleged assaults occurred at

240. *See id.*

241. *See supra* note 134.

242. *See supra* note 136.

243. *Hopkins*, 698 A.2d at 190-91 (Weisberger, C.J., dissenting).

244. *See id.*

245. *But see id.* at 185. *See id.* at 190-91 (Weisberger, C.J., dissenting).

246. *See id.* at 186; *see also* State v. Cardoza, 465 A.2d 200, 203-04 (R.I. 1983) (holding that the defendant's alleged sexual assault against the complaining wit-

the same locations, and the defendant did not use the same technique during each alleged assault.²⁴⁷ Therefore, it can hardly be contended that the defendant created some all-encompassing grand plan to sexually assault the complaining witnesses, Snoke and Hopkins, Jr.,²⁴⁸ since the only similarity between the three alleged assaults is the fact that they are all sex crimes. The practice of admitting prior bad-acts evidence under the plan exception simply because all of the alleged bad acts are of the same criminal nature, undercuts the intent of the plan exception and eviscerates the protections of Rule 404(b).²⁴⁹

Second, the court improperly admitted the prior bad-acts evidence under the plan exception because the prosecution did not prove that the defendant consciously chose to employ the same technique and methodology to commit each bad act.²⁵⁰ The only clear similarity between the three alleged crimes is that they are all sex crimes.²⁵¹ Specifically, the defendant allegedly molested both men at times and places extremely remote from the events involving the complaining witness.²⁵² Snoke alleged that his abuse occurred during a camping trip, at the defendant's gas station and at the defendant's home.²⁵³ Hopkins, Jr. could not even testify to details of the sexual assaults because of memory failure.²⁵⁴ By contrast, the complaining witness alleged that the abuse occurred at the defendant's home briefly before the arrest which gave rise to the case.²⁵⁵ The Rhode Island Supreme Court erred by admitting the prior bad-acts evidence under the plan exception since the prosecution failed to show that the defendant used some common method or technique when committing these alleged acts of molestation.

ness's grandmother could not be admitted to show the defendant's plan since the two crimes were not related).

247. See *Hopkins*, 698 A.2d at 186.

248. See *id.*

249. See Mar, *supra* note 21, at 857.

250. See *Hopkins*, 698 A.2d at 190-91 (Weisberger, C.J., dissenting).

251. See *id.*

252. See *id.* at 190. John Snoke and Charles Hopkins Jr. each claimed they were molested by the defendant some ten years prior to the alleged assaults against the victim and some fourteen to eighteen years before the trial. See *id.* at 186.

253. See Brief for Appellant at 5, *Hopkins* (No. 96-212-C.A.).

254. See *id.* at 21.

255. See *id.* at 2-3.

Third, the trial judge inappropriately admitted the defendant's prior bad acts under the plan exception because no similarities existed in the methods of alleged abuse or in the results supposedly achieved by the defendant.²⁵⁶ For example, all three assaults allegedly began when the victims were of various ages, and each alleged assault endured for different lengths of time.²⁵⁷ Snoke alleged that when he was thirteen, the defendant molested him on three different occasions all occurring within one year.²⁵⁸ Unlike Snoke, Hopkins, Jr. alleged that he thought that the defendant began molesting him when he was seven- or eight-years old and continued until he was approximately twelve-years old.²⁵⁹ Contrarily, the complaining witness alleged that the defendant abused him from the time he was nine-years old until he was thirteen-years old.²⁶⁰ Furthermore, each alleged assault involved different types of sexual abuse. For example, Hopkins, Jr. alleged that the sexual abuse consisted of anal sex, oral sex and touching.²⁶¹ Snoke claimed that the defendant performed oral sex on him,²⁶² and the complaining witness alleged instead that he performed oral sex on the defendant.²⁶³

Fourth, the defendant did not use any signature technique or methodology easily discernible to the court that suggests the three alleged assaults were linked in any manner.²⁶⁴ Since the defend-

256. See *Hopkins*, 698 A.2d at 189. The State asserted, and the court affirmed, that the testimony of Snoke was necessary to demonstrate to the jury why the victim finally brought charges against his stepfather. See *id.* at 185. This need is an "insufficient basis to permit this extremely prejudicial testimony" because "many victims of child molestation do not report the molestation immediately." Brief for Appellant at 12, *Hopkins* (No. 96-212-C.A.). See, e.g., *Commonwealth v. Hynes*, 664 N.E.2d 864 (Mass. App. Ct. 1996) (noting that since evidence of prior uncharged misconduct is inherently prejudicial as a general rule, it is not admissible to explain why the victim waited to report the alleged abuse); *State v. Mayfield*, 733 P.2d 438 (Or. 1987) (holding that the prosecution could not introduce the victim's three-year old sister's testimony to demonstrate why the victim finally reported the crime reasoning that the danger of unfair prejudice outweighed the probative value of such evidence).

257. See Brief for Appellant at 14, *Hopkins* (No. 96-212-C.A.).

258. See *id.*

259. See *id.* at 5-6.

260. See *id.* at 2 (the complaining witness alleged that he was being molested approximately six to eight times per week).

261. See *id.* at 5.

262. See *id.* at 14.

263. See *id.*

264. See *Hopkins*, 698 A.2d at 190 (Weisberger, C.J., dissenting).

ant used different means for each alleged molestation, the defendant did not employ any signature technique or methodology.²⁶⁵ Therefore, the prior bad-acts evidence is not relevant to show the defendant's plan since Snoke's and Hopkins, Jr.'s alleged assaults were neither part of a plot to enable the commission of the present crime²⁶⁶ nor the means to the end of achieving some grand objective.²⁶⁷ For these reasons, admission of the prior bad-acts evidence denied the defendant the protections guaranteed by Rule 404(b).²⁶⁸

C. *The Misapplication of Rhode Island Case Law*

The *Hopkins* court relied on inapplicable case law to support the trial judge's decision to admit the prior bad-acts evidence under the Rule 404(b) plan exception. The majority cited three Rhode Island cases in which the court affirmed the admission of prior uncharged bad-acts evidence under traditional 404(b) other purposes.²⁶⁹ *Hopkins* is distinguishable from each of these cases.

1. *The Misapplication of State v. Lamoureux*

The court first cited *State v. Lamoureux*²⁷⁰ for the principle that the prosecution may admit evidence of the defendant's prior sexual assaults against someone other than the complaining witness to prove plan.²⁷¹ In *Lamoureux*, the State charged the defendant with first-degree sexual assault.²⁷² The court admitted prior bad-acts testimony under the plan exception, holding that the evidence established that the defendant used "substantially identical" methods of operation during each attack.²⁷³ In both instances,

265. See *id.*

266. See Wigmore, *supra* note 134, § 217, at 1883.

267. See *State v. Sepe*, 410 A.2d 127, 130 (R.I. 1980) (holding that the prosecution can only admit prior bad-acts evidence under the 404(b) plan exception if there are "two or more crimes so related to each other that proof of one tends to establish the others").

268. See *State v. Wallace*, 431 A.2d 613 (Me. 1981) (holding that evidence of prior uncharged bad acts was extremely probative of defendant's guilt in the present crime); *Bryden & Park*, *supra* note 58, at 546; *Fingar*, *supra* note 60, at 517; *Imwinkelried*, *supra* note 127, at 1014.

269. See *Hopkins*, 698 A.2d at 185 (citing *State v. Lamoureux*, 623 A.2d 9, 13 (R.I. 1993); *State v. Cardoza*, 465 A.2d 200, 203 (R.I. 1983); *State v. Pignolet*, 465 A.2d 176, 180 (R.I. 1983)).

270. 623 A.2d 9 (R.I. 1993).

271. See *Hopkins*, 698 A.2d at 185 (citing *Lamoureux*, 623 A.2d at 13).

272. *Lamoureux*, 623 A.2d at 10.

273. *Id.* at 13.

the defendant approached the alleged victim at a bar and proceeded to gain the victim's confidence by engaging in neutral topics of conversation.²⁷⁴ Then, in each case, the defendant asked the victim for her phone number, requested a ride home and instigated sexual advances that escalated into sexual demands.²⁷⁵ *Hopkins* is distinguishable from *Lamoureux* because, in *Lamoureux*, the prosecution used the plan exception to show the defendant's modus operandi, or motive of operation.²⁷⁶ *Lamoureux* notes that modus operandi is only an applicable other purpose when either the prosecution or the defense raises the issue of identity or consent.²⁷⁷ In *Lamoureux*, the defendant claimed that the victim consented to the sexual encounter.²⁷⁸ Since the defendant raised the issue of consent in *Lamoureux*, it was appropriate for the court to receive the evidence of other acts in order to prove the defendant's modus operandi.²⁷⁹

By contrast, the *Hopkins* court never discussed the issues of identity or consent, and the defendant never raised these defenses.²⁸⁰ Specifically, in *Hopkins*, there was no question whether the stepfather was the person who sexually assaulted the victim. Therefore, identity was not an issue.²⁸¹ Additionally, since the defendant denied having sexual relations with the complaining witness, the defense did not make consent an issue.²⁸² Thus, because identity or consent were not issues in *Hopkins*, the reasoning of the *Lamoureux* court does not apply to *Hopkins*.

2. *The Misapplication of State v. Cardoza*

The majority also incorrectly relied on *State v. Cardoza*²⁸³ to support its holding that the trial court appropriately applied the plan exception in *Hopkins*.²⁸⁴ In *Cardoza*, the court admitted the prior bad-acts evidence under the expanded lewd-disposition ex-

274. *See id.*

275. *See id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Hopkins*, 698 A.2d at 183.

281. *Id.* at 185.

282. *See id.* at 186.

283. 465 A.2d 200 (R.I. 1983).

284. *Hopkins*, 698 A.2d at 184.

ception and not the plan exception. Specifically, in *Cardoza*, the court affirmed the admission of prior third-party bad-acts evidence because the evidence came from a sibling who lived with the defendant and the victim and who alleged abuse during the same time period.²⁸⁵ By contrast, the prior third-party bad-acts evidence offered in *Hopkins* does not fall under the lewd-disposition theory because neither witness lived with the complaining witness at the times of the alleged assaults, nor was either witness associated with the defendant around the time the defendant assaulted the complaining witness.²⁸⁶

Cardoza, in fact, offers support for *Hopkins*' argument that the court improperly applied the plan exception. Specifically, in *Cardoza*, the court held that the trial judge committed a reversible error by permitting prior bad-acts testimony from the complaining witness's grandmother.²⁸⁷ The court held that the trial judge improperly admitted the grandmother's testimony since the prior bad-acts evidence only indicated that the defendant committed a similar, yet independent, crime from the crime charged.²⁸⁸ Similarly, in *Hopkins*, the prior bad-acts evidence demonstrated alike yet independent crimes because the crimes occurred outside the complaining witness's home and over ten years prior to the crime charged.²⁸⁹ Thus, *Cardoza*, in fact, demonstrates that the *Hopkins* court misapplied the plan exception.

3. *The Misapplication of State v. Pignolet*

Finally, the *Hopkins* court incorrectly relied on *State v. Pignolet* to support its holding that the trial judge correctly admitted the prior bad-acts evidence under the plan exception. *Pignolet* represents an example of the application of the lewd-disposition

285. *Cardoza*, 465 A.2d at 203.

286. *Hopkins*, 698 A.2d at 189.

287. *Cardoza*, 465 A.2d at 204 (holding that the grandmother's prior bad-acts evidence was inappropriately admitted "to establish a behavior pattern of a man who sexually abuses his stepchildren" and that the evidence is "cumulative and unnecessary").

288. See *id.*; see also *State v. Jalette*, 382 A.2d 526, 531 (R.I. 1978) (noting that prior bad-acts evidence is inadmissible if the evidence is cumulative); *State v. Mas-tracchio*, 312 A.2d 190 (R.I. 1973) (holding that courts cannot admit prior misconduct evidence to prove the defendant's propensity to commit bad acts).

289. *Hopkins*, 698 A.2d at 186.

exception and not the plan exception.²⁹⁰ In *Pignolet*, the court affirmed the admission of prior bad-acts testimony from the complaining witness's stepsister. The court explicitly permitted the admission of the prior bad-acts evidence under the lewd-disposition exception only because both victims lived in the same home as the defendant, and the alleged assaults occurred during the same time period.²⁹¹ Contrary to *Pignolet*, the *Hopkins* court cannot use the lewd-disposition exception to admit the prior bad-acts evidence since neither alleged victim lived with the complaining witness and the defendant at the time of the charged crime, and ten years separated the alleged attacks.²⁹² Therefore, *Hopkins* is distinguishable from *Pignolet*.

By misapplying the reasoning in *Lamoureux*, *Cardoza* and *Pignolet*, the *Hopkins* court inappropriately expanded the plan exception beyond its conceived scope. The Rhode Island Supreme Court originally adopted the 404(b) plan exception to limit the admission of prior bad-acts evidence to instances where the facts of the case demonstrated that the uncharged and charged bad acts were part of a common scheme.²⁹³ Expanding the plan exception to situations containing only "similarities" among the bad acts defeats the purpose of the plan exception and its protections for the defendant.²⁹⁴

V. CONCLUSION

State v. Hopkins demonstrates the Rhode Island Supreme Court's continuing practice of limiting the safeguards instilled within Rhode Island Rule of Evidence 404(b) with regard to sexual-molestation prosecutions. In effect, this unjustifiable trend is hammering the final nail in the coffin of evidentiary Rule 404(b). In an attempt to respond aggressively to a difficult case, the *Hopkins* court (1) broadened the lewd-disposition exception to the point that all prior uncharged bad-acts evidence is admissible in sex offense prosecutions and (2) expanded the 404(b) other purposes to the

290. See *Pignolet*, 465 A.2d at 181; see also *State v. Gomes*, 690 A.2d 310, 317 (R.I. 1997) (noting that *Pignolet* expanded the lewd-disposition exception).

291. See *Pignolet*, 465 A.2d at 181.

292. *Hopkins*, 698 A.2d at 186.

293. R.I. R. Evid. 404(b).

294. See *Mar*, *supra* note 21, at 860.

point that the court can pigeonhole all prior misconduct evidence into the plan exception.

As Chief Justice Weisberger warned, the court is causing “the exceptions set forth in Rule 404(b) and *Jalette* and *Pignolet* to swallow the rule [against character evidence] and render it a nullity.”²⁹⁵ To prevent the continuation of this practice, it is time for the court to start applying the principles of evidentiary Rule 404(b) more faithfully and thereby adopting a more limited approach with respect to the admission of propensity evidence.

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295. *Hopkins*, 698 A.2d at 191 (Weisberger, C.J., dissenting).

